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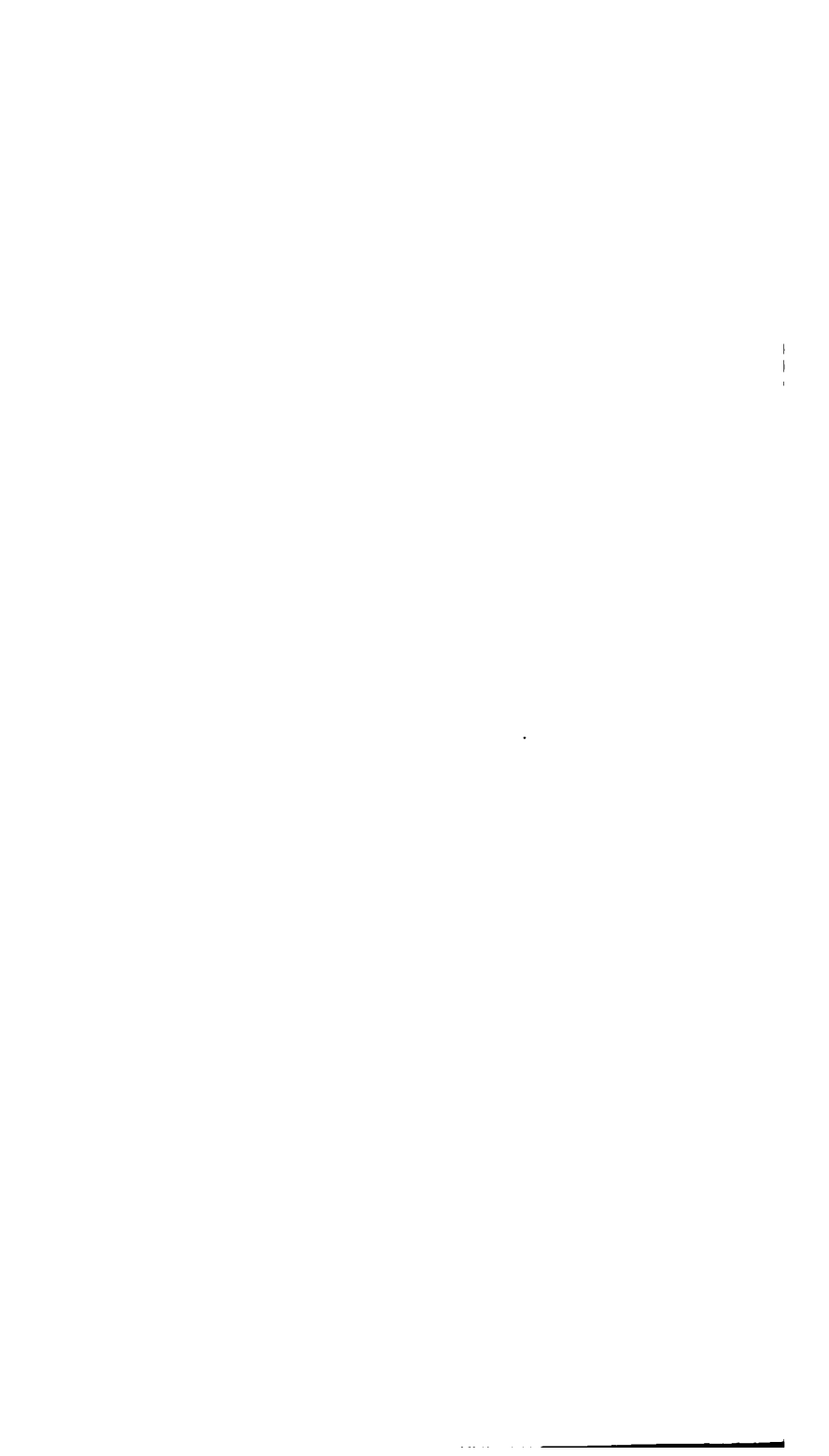
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REPORTS

OF

CASES IN LAW AND EQUITY

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF GEORGIA,

AT

MILLEDGEVILLE, DECEMBER TERM, 1866.

WITH AN

APPENDIX

CONTAINING SEVERAL CASES DECIDED BY THE

HONORABLE JOHN ERSKINE,

IN THE

CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES FOR GEORGIA.

TO WHICH IS PREFIXED A TABLE OF CASES REPORTED IN THE FIRST
THIRTY-ONE VOLUMES OF THE GEORGIA REPORTS,
AND AFTERWARDS CITED IN ONE OR MORE
OF SAID VOLUMES.

VOLUME XXXV.

No. ———
Law Scho

BY LOGAN E. BLECKLEY, Reporter.

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of Georgia.

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CHIEF JUSTICE, ATHENS.

HON. DAWSON A. WALKER, DALTON.

HON. IVERSON L. HARRIS, MILLEDGEVILLE.

LOGAN E. BLECKLEY, REPORTER, ATLANTA.

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* This great magistrate and good man, resided for the last time at this Term. He died June 4th, 1867.—REP.

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IN MEMORY
OF
HON. EDWARD Y. HILL.

TROUP SUPERIOR COURT, NOVEMBER TERM, 1860. }
Wednesday morning, November 21. }

Death has again invaded our brotherhood. **HON. EDWARD YOUNG HILL.** is no more. His journey on earth ended last night, and to-day he will be consigned to the silent mansions of the dead.

Only a few days ago he moved among us in life and health and hope. Impelled by an ardent patriotism, for which he was ever distinguished, he met his neighbors and fellow-citizens last Saturday in political council, and in response to their wishes, attempted to address them on the momentous issues that press upon our country. In the midst of an able and eloquent speech, his powers suddenly failed, his voice faltered, his vision grew dim, his frame quivered and sank into paralysis, and his once vigorous and noble intellect, sympathising with the body, lost much of its wonted force and fire. From that time he declined rapidly, until the final summons came and delivered him from the weakness, and the pain, and the sorrows of mortality.

Judge **HILL** was born in Abbeville District, S. C., on the 10th day of January, 1805. At the age of fourteen years

IN MEMORY OF HON. EDWARD Y. HILL.

He was sent to Athens, Ga., to a preparatory school under the care of Dr. Moses Waddell. He soon entered Franklin College, and there he graduated with honor in 1824. In the following year he commenced the study of law, at Monticello, in the office of Col. Warner. Having completed his course, and been admitted to the bar, he was elected Solicitor General of the Ocmulgee Circuit. He next, at different times, represented the County of Jasper in both branches of the Legislature, and then succeeded Judge Polhill as Judge of the Ocmulgee Circuit. While still residing in that Circuit, he was elected Judge of the Coweta Circuit, and removing at once to LaGrange, his first appearance among us was in the character of a Magistrate. Being twice re-elected, he continued to preside with signal ability, and with the approbation of the bar and the people of the whole Circuit, until the Autumn of 1853, when he voluntarily retired from the bench, and resumed the practice of his profession. In the mean time, standing high in the esteem and confidence of his political friends and associates, he was nominated, in 1849, as their candidate for Governor; and although defeated, he bore himself gallantly in the contest, and received all the support that the state of politics in Georgia at that time could enable the most popular leader of his party to command.

For every position of public trust to which he was called he was peculiarly well qualified. As a Judge he was eminently distinguished for a prompt and clear perception of all the points in a case, and for the ease, grace and vigor with which he separated, arranged and combined them. He presented, with ready skill, the correct solution of almost every intricate question. Besides the advantage of legal learning, he possessed what may be called natural aptness for judicial functions. Even had he not been a great Lawyer we could almost say he might still have been a great Judge. In the moral attributes of a good magistrate, he was no less eminent than in the intellectual. Scrupulously honest, he guarded

incessantly against the inroads of passion and prejudice, and held the scales of justice with an even hand. To *do right* was his constant aim.

In private life, he was so pre-eminent that even the partiality of friendship is scarcely able to do justice to his memory. Kindness of heart, amiability of temper, urbanity of manners, generous hospitality—are ideas associated with his name, in the minds of all who knew him. None of us can think of him without reverting at the same time to these admirable traits, which have shone so conspicuously in his life and character. As a husband and father he was all that affection—the most tender affection—could make him. In every relation, domestic and social, he was more and better than it falls to the lot of many to be or become. Therefore,

Resolved, 1st. That in the death of the Honorable EDWARD Y. HILL, one of Georgia's brightest intellects has been extinguished; a profound lawyer, an upright judge, a spirited and patriotic citizen, an affectionate, devoted friend, a gallant gentleman, an honest man, has departed; a noble heart has ceased to beat.

Resolved, 2d. That we tender his afflicted family our warmest sympathy for the loss which they, in common with ourselves, our State, and our whole country, have sustained.

Resolved, 3d. That this Court stand adjourned until tomorrow morning, as a tribute of respect to him who has so long adorned its bench with such distinguished ability; and that the Bar, in a body, attend his funeral this afternoon.

Resolved, 4th. That this report and these resolutions be entered upon the minutes of the Court, and that the Clerk furnish a copy of the same to the family of our deceased brother; and that the Chairman of this Committee report these pro-

ceedings to the Supreme Court of this State, at the next term in Atlanta.

M. M. TIDWELL, THOS. L. COOPER, BENJ. H. BIGHAM, P. O. HARPER, L. E. BLECKLEY,	}	Committee.
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It is ordered that these resolutions of the committee be entered on the minutes of the Court, and their request complied with. And that, in token of our respect for the memory of the deceased, this Court be now adjourned till to-morrow morning.

O. A. BULL, J. S. C., C. C.

CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF THE STATE OF GEORGIA,
AT MILLEDGEVILLE,
DECEMBER TERM, 1866.

Present—JOSEPH H. LUMPKIN, Chief Justice.
 DAWSON A. WALKER, } Judges.
 IVERSON L. HARRIS, }

WILLIAM E. ARCHER, plaintiff in error, vs. THE STATE OF
GEORGIA, defendant in error.

In administering the Code in trials for murder, founded on direct proof, the Court should not charge the jury that they can recommend to mercy, but should charge distinctly that they can recommend imprisonment in the Penitentiary for life.

Murder. In Fayette Superior Court. Tried before Judge
WARNER. September Term, 1866.

The plaintiff in error was tried for the offence of Murder.

At the request of the Solicitor General, the Court instructed the Jury, that if they found the prisoner guilty, they might, if they thought proper to do so, recommend him to the mercy of the Court.

After a verdict of guilty, counsel for the prisoner made this charge one ground, among divers others, of a motion for a new trial. The Court refused to grant a new trial, and that refusal is alleged as error.

The jury having, by their verdict, recommended the pris-

William M. Archer vs. The State of Georgia.

oner to mercy, the Court sentenced him to confinement in the Penitentiary for life

TIDWELL & CALHOUN for plaintiff in error.

HULSEY (Solicitor General) and STEWART for The State.

LUMPKIN, C. J.

Archer was convicted of murder in Fayette county, and sentenced to imprisonment for life. He moved for a new trial on various grounds—that the verdict was contrary to evidence, newly discovered evidence, &c. It is complained, that when the Judge asked, if he had omitted to charge anything, he was reminded by the Solicitor General, that he had not stated to the jury that they might recommend to mercy—that the Court made the suggestion, but it seems, without advertent to the new clause in the Code upon this subject.—See Section 4220, par. 5, which reads thus: “The punishment of murder shall be death, but may be confinement in the Penitentiary for life, in the following cases: 1. By sentence of the presiding Judge, if the conviction is founded solely on circumstantial testimony, or if the jury trying the traverse shall so recommend. In the former case it is discretionary with the Judge; in the latter it is not. 2. By commutation of the Governor. 3. By act of the General Assembly.”

Thus it will be perceived, there are two cases where the prisoner may be punished by confinement in the Penitentiary for life, if convicted capitally: 1st. When the conviction is founded solely on circumstantial evidence, when the Judge may or may not commute the punishment in his discretion. 2. If the jury trying the traverse shall “so recommend;” in that case it is not discretionary, the Judge is obliged to commute the punishment:—in the latter case, the jury direct the punishment and not the Judge.

Now the Judge, when his attention was called to the sub-

ject by the Solicitor General, said to the jury, that they might recommend to mercy, and they accordingly did so; but that was not the idea of the Code. It was not that the jury should recommend to mercy, but that they should recommend specifically that he should be imprisoned in the Penitentiary for life, instead of being hung. Perhaps, if this alternative had been distinctly presented to the jury, they might have found an inferior grade of homicide. True, the Judge, with that humanity which characterized his conduct throughout the trial, seized upon the recommendation to mercy to commute the punishment from death to perpetual imprisonment, although this form of the recommendation was not authorized by the Code. Still, I repeat, that the jury might not have found the prisoner guilty of murder, if they had known that their recommendation to mercy was to have the effect of imprisoning him for life.

As all the other irregularities complained of may be corrected on another trial, it is needless to allude to them now; and we especially refrain from expressing any opinion upon the facts of the case. On the main point, viz: who made the first attempt to shoot, hangs their case; and as to that, the testimony is contradictory. It is peculiarly for the jury to settle that matter.

We cannot but express our regret, as we have done before, that counsel for the State should permit their zeal to betray them to comment upon facts not proven before the jury. They owe it to themselves as honorable men to abstain from this too common practice. And even in this Court, where there is no excitement to mislead them, counsel here permit themselves to state facts not in the record, and this makes a lodgment in the mind, which, if it does not warp our judgment, embarrasses the investigation. This practice might justify a stern rebuke, even to the setting aside of the verdict procured, in part, in this way; but we trust this reprobation of the practice, again solemnly reiterated, will suffice to cure the evil. To an ingenuous mind the consciousness of having contributed to deprive a fellow-creature of life, a

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liberty, by forcing into the argument of the case gratuitous statements, not authorized by the proof, would, it seems, be punishment enough.

Judgment reversed.

J. A. ANSLEY & Co., plaintiffs in error, vs. ANDERSON, ADAIR & Co., defendants in error.

A, a commission merchant of Atlanta, had in store 20 hogsheads of sugar, belonging to H, which by mistake he sent to B, of Augusta, to be sold for Confederate notes, at 58 cents, per pound. B, made the sale and tendered the proceeds to A, who having learned the mistake in the mean time, refused to receive them, claiming the sugars instead. B, also tendered the notes to H, who refused to receive them. B, deposited the amount in hand, in his own name, notifying A, that it was so deposited, and was subject to his order at any time. A, brought an action of Trover against B, for the sugars, and pending the litigation the notes became worthless:—Held that A, is not entitled to recover; that the Confederate notes were the property of A, in the hands of B., and that B. was not an insurer against depreciation, but was bound for only reasonable care in keeping the notes, and to deliver them whenever A. would receive them.

Trover. In Richmond Superior Court. Tried before Judge W. M. REES. April Term, 1866.

This action was brought in August 1863, by Anderson, Adair & Co., against J. A. Ansley & Co., to recover for the conversion of twenty hogsheads of sugar.

The defendants, after the usual plea of not guilty, plead as follows: "That the plaintiffs at the time alleged in their petition were not possessed of the said goods and chattles in said petition mentioned, or any of them, or any part thereof, as of their own property, in manner and form as alleged.

That on the twenty-fourth day of February, eighteen hun-

dred and sixty-three, one John L. Harris, of LaGrange, Georgia, authorized them to sell certain of his sugars, held by the plaintiffs, and instructed plaintiffs to send these defendants samples thereof.

"That thereupon plaintiffs sent to defendants samples of ninety-five hogsheads of sugar, as the property of, or under the control of, said Harris, and by which samples, the said ninety-five hogsheads were sold on the fifth day of March, eighteen hundred and sixty-three, by these defendants, and on their arrival were delivered to the purchaser: That of this ninety-five hogsheads are the twenty sued for by the plaintiffs, and which subsequently were ascertained to be the property of one John Harris, of Covington, Georgia, and not to have been under the control of said John L. Harris.

"That these defendants were not guilty of any conversion of the said twenty hogsheads, but allege the sale of the same to have been caused solely by the mistake of the plaintiffs themselves, which was not discovered until the entire lot of twenty hogsheads, except one, was delivered to the purchaser.

"That they are Factors and Commission Merchants: that the twenty hogsheads of sugar sued for were sold by them on the fifth of March, eighteen hundred and sixty-three, by a mistake of the plaintiffs: the same having been shipped by the plaintiffs to defendants, supposing them to be the property of one John L. Harris, who had authorized the defendants to sell his sugars then with plaintiffs: that upon making such sale and rendering account thereof, to said John L. Harris this mistake was discovered, and thereupon these defendants tendered the proceeds thereof, amounting to twelve thousand four hundred and seventy-eight dollars and seven cents, in Confederate States Treasury Notes, to John Harris, the true owner, and to the plaintiffs, both of whom refused to receive the same, by reason of which they remained in the hands of these defendants and have since become and now are utterly valueless.

"That no conversion of the sugar, or its proceeds, was ever made by these defendants."

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The following facts, agreed on by the counsel, were submitted to the jury :

On the 23d February, 1863, John L. Harris, of LaGrange, Georgia, came to the city of Augusta and employed the defendants, who were Factors and Commission Merchants, to sell certain sugars for him, which were then in the possession of the plaintiffs in Atlanta, and telegraphed the plaintiffs to send samples of his sugars to the defendants. On the 24th February, the said John L. Harris, in the office of the defendants, wrote a letter in their presence to the plaintiffs, stating the fact of having telegraphed, and advising them that he had authorized defendants to sell the sugars at 58 cents per pound, delivered in Augusta, no statement being made to the defendants of the amount of the sugars.

The plaintiffs received the telegram and letter, and on the 27th February, shipped to defendants samples of ninety-five hogsheads of sugar as per instructions, marked J. L. H., E. B. W. and H. C. & Co.

Upon the receipt of the samples defendants sold the sugars to James A. Gray, March 5, 1863, at 58 cents per pound. Ninety-five hogsheads were sold and delivered: ninety-three on the 12th, and two on the 20th March, 1863. Immediately after the sale, notice was given to John L. Harris that the proceeds were subject to his order. Upon the receipt of this letter, John L. Harris wrote to plaintiffs that they had made a mistake in sending too much sugar. Upon the receipt of this letter the plaintiffs investigated the matter and found that they had shipped twenty hogsheads of sugar marked H. C. & Co., belonging to John Harris, of Covington, Georgia, supposing that the entire lot was controlled by John L. Harris, of LaGrange. That on the 18th March, they wrote defendants to this effect, who received the letter on the 19th, and this was the first information received by defendants of the mistake.

That all of the sugars had then been delivered to the purchaser, except two hogsheads, of which one only was of the H. C. & Co. lot: that defendants endeavored to rescind the

sale to Gray, to the extent of these 20 hogsheads of sugar, which he, Gray, declined to do.

The defendants then tendered the proceeds in Confederate Treasury Notes, for which the sale had been made by direction, and which amounted to twelve thousand four hundred and seventy-eight dollars and seven cents, to the plaintiffs, Anderson, Adair & Co., who refused to take it, claiming the sugars instead. A few days after, John Harris, the owner, called on the defendants, and they tendered the same amount to him, which he refused. Defendants then deposited the amount to their credit in Bank, notifying the plaintiffs that it was subject to their order at any time. The deposit was a general one, and January 6th, 1864, the amount was again formally tendered to the plaintiffs and refused: it was then again deposited in Bank. It was admitted that Ansley had a deposit at all times more than sufficient to satisfy plaintiffs' claim. In the interim, John Harris, of Covington, after having refused to accept the proceeds of the sale, set up a claim against the plaintiffs, which was submitted to arbitration, and an award was found against the plaintiffs for 77½ cents a pound, April 24, 1863.

This they paid, and to the October Term, 1863, of Richmond Superior Court, brought their action of Trover, for the said twenty hogsheads of sugar, against the defendants. At the April Term, 1865, of said Court, a trial was had of the cause before the petit jury. The defendants produced the money into Court, where it remained until it became valueless, when it was withdrawn. Upon this trial, the defendants admitted the right of plaintiffs to recover for twelve thousand four hundred and seventy-eight dollars and seven cents, and a verdict was had for that amount only. The verdict having been general, and the plaintiffs' attorney refusing the Confederate currency, the defendants, in view of the then condition of political affairs, on the 24th day of April, 1865, entered an appeal, and the case came up for trial at April Term, 1866, on appeal.

The plaintiffs, conceding that they had no right to a larger

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amount, claimed a verdict against the defendants, for two thousand four hundred and ninety-five dollars and sixty-one cents, being the amount the Confederate money tendered them was worth on the 5th March, 1863. Defendants, waiving all exception to the form of plaintiffs' action, but desiring, if the plaintiffs were entitled to recover in any form of action, to have it determined, insisted that under the circumstances they were not liable to plaintiffs for any amount whatever.

The Court charged the jury that if the identical money tendered had been kept separate from all other, and marked as the plaintiffs', or had been deposited to credit of plaintiffs, it would have been at their risk, but having been used by defendants as their own, by being deposited to their credit, they must abide by the depreciation, and be held liable for the value of the Confederate notes at the time of the tender.

The jury, under this charge and under the direction of the Court, found for the plaintiffs the sum of two thousand four hundred and ninety-five dollars and sixty-one cents, to be paid in gold; the same being the admitted value in specie of the net proceeds of the sugar on the day of sale.

To this charge and direction of the Court, the defendants, by their counsel, excepted, and now assign the same as error.

MILLER, for plaintiffs in error.

GOULD, for defendants.

WALKER, J.

Which of these parties should sustain the loss of the proceeds of the sale of the sugars? Most assuredly the party who was at fault. Which party, then, was at fault? The plaintiffs, by mistake, wrongfully sent the sugars to defendants to be sold. John L. Harris wrote to plaintiffs that he had authorized defendants to sell his sugars at 58 cents per pound, delivered in Augusta, no statement being made to defendants of the

amount of the sugars. Plaintiffs had possession of Harris' sugars, and under an order from him to send *his* sugars to defendants, they sent the twenty hogsheads in controversy. They were, with the others, sent by the plaintiffs to be sold and delivered; the defendants did sell and deliver, and immediately proposed to account for the proceeds. In what respect were they at fault? According to Harris' orders they made the contract of sale, and according to *plaintiffs' statement as to the quantity*, they made the delivery. They proposed to account with John L. Harris, and with the plaintiffs, and with John Harris, the true owner. Neither John L. Harris, their supposed principal, nor the plaintiffs, who had sent them the sugars, nor John Harris, the real owner, would receive the money.

Samples of each hogshead were to be sent *by the plaintiffs*, and the contract of sale was to be made by the samples sent. Plaintiffs sent ninety-five samples, and when notified of the making of the contract of sale, sent the same number of hogsheads, which included the twenty in controversy. Under these circumstances, the making of the sale by defendants could not be considered, *as against the plaintiffs*, a wrong.

It was urged that defendants were at fault in not learning from John L. Harris how many hogsheads he proposed to sell. But this was a matter of indifference to them. They were commission merchants, and of course were willing to sell whatever amount he might have sent to them for that purpose.

Defendants sold the sugars, and tendered the proceeds, in Confederate States Treasury notes, *for which the sale had been made by direction*, to the plaintiffs, who refused to take it, *claiming the sugars instead*; and the question then with them was what they should do with the proceeds. The sale "by direction" had been made for the Confederate notes, which notes were in the hands of defendants, and rapidly depreciating; and it was not surprising that the defendants should be anxious to relieve themselves from liability on

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account of this fund. They offered to pay it to anybody that they thought had any color of right to receive it, but no one would take it. Finding they could not pay it to any one authorized to receive it, they "deposited *the amount* to their credit in bank, notifying the plaintiffs that it was *subject to their order at any time.*" Here, it is insisted, the defendants committed a fatal error. Judge Stephens, who argued this case the second time for plaintiffs, seemed willing to admit that up to this period the plaintiffs were altogether at fault, and defendants were blameless. But he insisted, as had our learned brother Gould at the preceding Term, that defendants, by making a general and not a special deposit "to the credit of the plaintiffs," and by not keeping "the identical money tendered separate from all other, and marked as the plaintiffs'," made themselves the *debtors* of the plaintiffs for the amount; in other words, that this deposit, made under these circumstances, was a conversion of the bills to their own use, and they must account for the value of the notes at the time of the tender; and such was the view taken by the learned Judge who presided on the trial. Let us examine this view of the case, as well as the authorities relied upon to sustain it.

On the first argument, two cases were read to support this view of the question: *Robinson, Clerk, vs. Ward, Gent., etc.*, 2 C. & P. 59 (12 E. C. L. R. 449), and *Phillips, Ex'r., vs. Lamar, Sheriff*, 27 Ga. R. 228. The case first cited was where a Solicitor received, on the 21st August, 1824, £5300, out of which he was to pay certain incidental expenses, and place the residue in the funds. The defendant, previously to the 10th September, paid the identical notes received, to the credit of his private account, at his banker's; *the bank* paid during the 11th, *but never paid after that.* The question was, which party should suffer *by the failure of the bank*, the depository. *Under these facts*, the Court says: "The defendant should have paid this money into a banker's hands, by opening a new account in his own name, 'for the credit of Robinson's estate,' and so to ear-mark the money

as belonging to that estate; thus it would have been kept separate. But if the person having the money mixes it with his own, he thereby makes himself personally debtor to the estate. Here the defendant has mixed this money with his own, by paying it to the credit of his private account at his bankers; and he is, therefore, liable to this action." This case, doubtless, controlled the judgment of the Court below, for in his charge to the jury he says: "But having been used by defendants as their own, by being deposited to their credit, they must abide by the depreciation, and be liable for the value of the Confederate notes at the time of the tender." The facts of the two cases are by no means similar. In the case cited, an attorney received money to be invested in the funds, and between the time of its receipt and investment he deposited it with his banker, in his own name, and *the banker failed* within a few days after the deposit. In the case at bar, the *factor* had received the *property* of his *principal*, tendered it to him repeatedly, and being unable to get him to receive it, placed it with a safe depository, subject to the order of the plaintiffs *at any time*. Plaintiffs refused the notes tendered, to which they were entitled, and claimed the sugars instead, to which they were not entitled. The defendants made the deposit in a place where the funds were always accessible to the plaintiffs; for there has not been a day, from the date of the tender to the present time, when the plaintiffs could not have obtained the notes if they had desired to do so. The difficulty about the matter was, that the notes were precisely what the plaintiffs did not want; all the time they were "claiming the sugars instead." If the bank in which the notes were deposited had failed, and plaintiffs had sued defendants to recover their value, then perhaps, the principle of *Ward and Robinson* might be nearer applicable to the case. Under the existing facts, the case is not in point. The case in 27 Ga. was where a Sheriff had collected money on an execution for a plaintiff, and instead of making the plaintiff, or his attorney, the depository of the money, as the Court seemed to think he ought to

have done, deposited it in the Manufacturers' and Mechanics' Bank of Columbus, which failed some two months thereafter without paying said deposit. In that case, the Court held that: "If a Sheriff collect money, and of his own accord deposits the money in a bank which fails, he is liable to respond to the plaintiff." It is a sufficient reply, that in the case at bar there is no question arising out of the failure of the depository. The proceeds of the sale of the sugars are, and all the time have been, subject to the order of the plaintiffs.

On the second argument of the case, at the December Term, Judge Stephens relied very confidently upon the case of the *Fulton Bank of New York vs. The Marine Bank of Chicago*, reported in 2 *Wallace S. C. R.* I have not the book before me, but think I recollect the principal facts of the case and the point decided. Early in 1869, the bank notes circulating in Chicago were some five or six cents below par, and the Marine Bank issued a notice to its customers, that it could not make collections and remittances as theretofore, unless the customers would receive the depreciated Illinois currency. Subsequent to this notice, the Fulton Bank sent to the Marine Bank, for collection, notes amounting to upwards of \$3,000. In May, 1862, the notes were paid in Illinois currency, then at a discount of ten per cent. No notice was given of the collections. In answer to a letter of inquiry from the Fulton Bank as to how its account stood, the Marine Bank answered there was due the amount of the collections. By the end of the year, Illinois currency was worth only fifty cents on the dollar. The Fulton Bank then demanded payment of its claim, and the Marine Bank proposed to pay in the depreciated currency—currency which had depreciated forty per cent. from the time of its reception, until the proposed payment—the tender of payment. It appeared that the currency collected by the Marine Bank was credited on the books to the Fulton Bank, and went into the funds of the Bank, and was used in its daily business the same as any other currency on hand. No tender was ever made of the currency received, to the Fulton Bank,

until the settlement was demanded at the end of the year. Under this state of affairs, the Court held that the Marine Bank, having in May received the currency, and used it as it did its other funds; credited the Fulton Bank with the amount on its books, and never having tendered the currency until it had depreciated from *ten* to *fifty* per cent.; that the Marine Bank thereby made itself the *debtor* of the Fulton Bank, and liable to pay the value of the Illinois currency at the time of its reception. This is a very different case from the one at bar. Suppose that, instead of keeping and using money as it did the other funds of the Bank, the Marine Bank had immediately notified the Fulton Bank of the collection, and tendered in payment the currency received, and the Fulton Bank had refused to receive it, although it had authorized the reception of the currency in payment of the claims; suppose that the Marine Bank had then deposited the amount in some other safe bank, and notified the Fulton Bank that the money was so deposited, and was subject to its order at any time; and after this the Fulton Bank, all the time refusing to receive the currency, had sued the Marine Bank for the value of that identical currency which had been tendered and refused, and which was ever subject to its order. Suppose all these facts to have appeared, is there anything in the case which would raise a presumption that the Court would have held the Marine Bank liable? I think not. And yet, to make this case analagous to the one at bar, all these supposed facts would have to appear. I admit, that some of the language used by that Court in delivering the opinion, would seem to be in favor of the position assumed by counsel for the plaintiffs, yet the language of the Court must be considered in relation to the facts of the case, and thus show a case altogether different from the one at bar.

The question here is who shall suffer the depreciation of these notes, which belonged to plaintiffs—were tendered to them at the proper time, and refused. This is not the ordinary case of a *debtor*, making a tender of money to his

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creditor ; but that of a factor, with effects in his hands belonging to his principal. Of course, if a debtor make a tender of money to his creditor, which is refused, the effect is to protect the debtor from interest and costs ; the debt remains still due, and the debtor must keep in readiness to pay whenever the creditor will receive. But a factor is not an insurer ; he is bound to exercise reasonable care, skill and diligence in taking care of the effects of his principal, and when he does this he is not liable. Did defendants exercise such care in this case ? “ *The amount* ” was deposited in a solvent bank, “ subject to the order of the plaintiffs, at any time,” and when sued, defendants brought the money into Court. The defendants, all the while, were trying to pay the Confederate notes, and the plaintiffs as earnestly trying to get something else, until the notes became utterly worthless. In March, when the notes were tendered and refused, the plaintiffs were “ claiming the sugars instead ; ” and to the October Term of the Court thereafter, they sued defendants, not to recover the Confederate notes, or their value, but to recover damages for the *wrongful conversion* of the sugars. On the final trial, however, in April, 1866, when they find that they must fail in their action of Trover, the plaintiffs *ratify the sale*, and ask that defendants pay the value of the Confederate notes at the date of the tender. They admit, that the notes were tendered at the proper time, and the proper amount, which amount was subject to their order at any time ; but inasmuch as the deposit was in the defendants’ name, they must now pay what was the value of the notes at the time. The money was in bank, subject to the order of the plaintiffs, and “ the presumption is that a check would have been paid if diligently presented.” *Per Kent. J.—Cruger vs. Armstrong*, 3 J. C. 9. *Marzetti vs. Williams*, 1 B. & Ad. 415 (20 E. C. L. R. 541.) If the money which has been tendered becomes, after a refusal to accept thereof, current at a less value than it was current when the tender was made, the party who refused to accept the money must bear the loss. 9 Bac. Abr. 317 ; *Bouv. Ed.*

This loss was not occasioned by any negligence of the defendants, or of the depository, but from an inherent defect of the property itself. In effect, plaintiffs neglected their property until it died of disease, the seeds of which were in it at the time it was received by defendants. For such a loss plaintiffs ask defendants to account. This is the whole case, and we think defendants ought not to be made to account. The Court below held defendants to be liable, and in so holding Judge Lumpkin and I think he erred.

Judgment reversed.

HARRIS, J., Dissenting.

My convictions of the law of this case, under the agreed statement of facts, are so fixed from a very careful consideration of them—that I cannot by any process of reasoning, bring my mind to assent to the judgment rendered by the majority of this Court.

I exclude as wholly immaterial to a proper decision, all the facts as to the mistake about the sugars—which party was most in fault—as also the form of action brought. I admit broadly that Anderson, Adair & Co., were blameable in not receiving the Confederate notes for which the sugars were sold by Ansley & Co., when *first* tendered in Court. They were in truth and right at that time the property of Anderson, Adair & Co. Anderson, Adair & Co. had then no claim in law or equity whatever for the sugars sold by Ansley & Co., but only to the Confederate notes paid for them by the purchaser. I apprehend that no lawyer will dispute the proposition that, after making the tender, Ansley & Co. could, by bill in Equity, have compelled Anderson, Adair & Co. to have received said notes in payment, and to have granted to them a full acquittance from all liability for the sugars. But no step of this kind was taken for their protection. Ansley & Co., had they sealed up in a package the Confederate notes tendered by them, and deposited that

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package in some safe and usual monied depository, *subject to the order of Anderson, Adair & Co.*, and promptly notified them of such special deposit—might also in this mode have exonerated themselves from all liability which might subsequently arise from the depreciation or destruction of said notes. Neither the one course or the other indicated, was resorted to by Ansley & Co.

So far from taking any step whatever, indicative of their considering and treating the Confederate notes as the sole property of Anderson, Adair & Co., they withdrew, immediately after the tender, the notes from Court, *and deposited them as money in Bank to their own credit, and mixed them with their own monies in said institution, and continued to use them by checking on their general deposit account for two years as their own property.*

I think that these notes were undeniably the property of Anderson, Adair & Co. The *tender admits the fact.* The mixing of these notes with their own monies by a general deposit to their *own credit*, and the *use of them* by checking on that general deposit *was an actual conversion.*

The simple question upon this state of facts, and the only legitimate one in the case is, whether Ansley & Co., did not make themselves responsible by these acts to Anderson, Adair & Co., for the value which these Confederate notes had at the time of their conversion? There is no question in the record as to what care Ansley & Co., were bound to use in reference to the notes tendered—but simply could they *use* them, could they appropriate them to their own business transactions—could they convert them to their own use without making themselves responsible for their value at the time of the conversion?

One of the distinguished counsel of the defendants in error asked “after the tender and refusal to accept, did the Confederate notes become a *waif*, which might be taken possession of by any comer or goer, and appropriated to his own purposes without responsibility to the owner? Did they become lawful objects of general plunder? Or did they still

remain the property of Anderson, Adair & Co.? If they still remained their property, they may have been in a very bad situation, indeed; with nobody bound to take even the least care of them, but surely they were not in a situation quite so bad as that Ansley & Co. could *lawfully* take them and appropriate them to their own use? Hence, the same repeated question returns on us, did Ansley & Co. appropriate these notes *to their own use*? Was the legal effect of their treatment of them a conversion?

That the use of them, by Ansley & Co., was a conversion, is demonstrated by a case in *2d Wallace Reports* p. 252, with a force and perspicuity which I had hoped, would have led my colleagues to agree with me. The case was The Marine Bank of Chicago, after having given notice to all its customers, including the Fulton Bank of New York, that it would make collections only in the bills of the Bank of Illinois, (then at a discount of ten per cent.,) and after waiting a reasonable time, without getting any countermand of the Fulton Bank's previous order to proceed with the collection of the promissory notes which were held for it by the Marine Bank, did proceed with the collection, and collected on notes belonging to the Fulton Bank, \$3,037, in bills of the Bank of Illinois, and placed the money to the credit of the Fulton Bank, with notice, that it was subject to the order of the Fulton Bank at any time. About a year afterwards, the Fulton Bank demanded a settlement. The Marine Bank offered to pay in the bills of the same Illinois Bank, (which had then fallen fifty per cent. below par,) but not the *identical* bills which were received on the collection of the notes. On these facts the Supreme Court of the United States, Mr. Justice Miller delivering the *unanimous* decision of the Court, held in affirmance of the judgment below, that the Marine Bank was bound to account *for the value which the bills of the Bank of Illinois had at the time of the collection*. The Court held, that the collection in that currency, was a proper one, after the notice which they had given, that they could not make collections in any other.

The only question in the case, as it is in this, was : How did their treatment of the Illinois Bank notes affect them ? The decision of the Supreme Court of the United States was that it made the Marine Bank liable for the value of the Illinois Bank notes, *at the time* when the Marine Bank placed them to the credit of the Fulton Bank of New York, and thereby *mixed them with its own funds*, which were used in its daily business. The Court said : "It is true, that it is not in evidence what precise use was made by it of the money received for the collections, but it is proved that it was placed with the other money of the Marine Bank, and used in its daily business as its own." Again, the Court say : "If it was defendant's money, it was all right, because it could do as it pleased with its own ; but if it was the *plaintiff's* money, held by defendant, as its agent, then the use of it by defendant would seem to be a *conversion*."

Is it not manifest that the decision in *Wallace's Reports*, goes upon the hypothesis (and is it not undeniably true) that the Illinois Bank notes still remained the property of the Fulton Bank, and that as the Marine Bank, by placing them with its own funds, *and using these mixed funds* in its own daily business, *converted them*, and *thereby* became liable for the value they had at the time of the conversion ?

Now, applying this principle to the case discussed, if the Confederate notes remained the property of Anderson, Adair & Co., after the first tender in Court, then Ansley & Co. *converted these notes by mixing them up in a general deposit in Bank with their funds, on which they daily checked*, in transacting their commission business, and in buying and selling, and by thus using these Confederate notes, the unquestionable property of Anderson, Adair & Co., *and not their own*.

This mixing up of the funds of Anderson, Adair & Co., with their own, and thereby destroying the identity of those Confederate notes, and the use of both together indiscriminately, was an actual conversion by Ansley & Co.

This was the precise point decided in *Wallace*, or the case decides no point at all.

Here I might rest the argument, but the view taken of the case by the majority of the Court authorizes its extension. They say in effect that, notwithstanding the mixing of the funds—the property of Anderson, Adair & Co.,—by Ansley & Co. with their own in Bank—the daily use of them in trade—the actual conversion of these Confederate notes to their own purposes—that because Ansley & Co., by letter, had said, that the Confederate notes were subject to the order of Anderson, Adair & Co. at any time, that this letter constituted *a continuing tender*, and that consequently the notes *were all the while, since the tender in Court, at the risk* of Anderson, Adair & Co.; and that Ansley & Co. could not be viewed in *the light of insurers*. To my mind, nothing seems clearer than that there was, in fact, but one tender. Its *legal effect* was to exempt Ansley & Co. afterwards from interest on the amount in their hands and Court costs, should Anderson, Adair & Co sue them for it. It had this extent—no more—especially as there was no separation of the funds—to preserve their identity, and deposit of them to the order of Anderson, Adair & Co.

I apprehend that it is undeniable, that, had Anderson, Adair & Co., upon the receipt of that letter, drawn their order on the bank where the Confederate notes were deposited, the Teller would not have paid it, for the plainest of all reasons: that no funds had been placed on the books of the bank to their credit. The refusal to pay in such case would not have given Anderson, Adair & Co. a right of suit against the bank. This demonstrates the proposition that the Confederate notes were *not subject to their order*, and, necessarily, that the letter could not connect itself back with the tender in Court, so as to invest it with the character ascribed to it, of its constituting “*a continuing tender*.”

It is a very great mistake of fact, to assert that the Confederate notes were at all times, after the original tender in Court, *subject* to the order of Anderson, Adair & Co. So

far from this being true, (and I refer to the agreed statement of facts made by the Attorneys of the respective parties to sustain me,) I assert *that they were never for a moment subject to the order or control of Anderson, Adair & Co. up to this time*, and hence the legal conclusion, that the notes were all the while at the risk of Anderson, Adair & Co. is *unauthorized by the facts*.

I declare my utter inability, in a *legal* sense, to comprehend that letter as a *tender* at all; it contained no money, or Confederate notes; there was no exhibition of any accompanying it, nor presentment of any for acceptance.

To term it a tender is to confound, in effect, two things that are clearly distinguishable: a mere declaration of willingness and readiness to pay, with an *actual exhibition* of money and offer to pay it.

It should be borne constantly in memory, that a very long interval of time elapsed between the tender in Court and the "letter" spoken of, during all of which Ansley & Co. were using the Confederate notes of Anderson, Adair & Co. as their own. It is the conversion of them, by the mixing them with their own funds in bank, and the use of these mixed funds during *this interval*, that fixes the liability of Ansley & Co. to account for their value, at the time they placed them in bank to their own credit, and which destroys the connexion between the original tender and the letter, and strips the latter of the character ascribed to it of being "a continuing tender."

The idea of "a continuing tender" cannot be predicated of the Confederate notes originally tendered, as they had not been kept *separate* or marked, so as to establish their identity; but having been mixed by the general deposit in bank, not only with the funds of Ansley & Co., but with the funds of other depositors, and the funds of the bank itself. I might safely say, that it was a moral impossibility that the Confederate notes, the property of Anderson, Adair & Co., could be tendered again, and, consequently, there could not have been "a continuing tender of them."

Paid out, as these Confederate notes must have been, on the checks of Ansley & Co., in the prosecution of trade, or to some other depositor with the bank, or by the bank to some one to whom it loaned money, or paid a debt, value was thus received for these notes, and it matters not by whom, since it was the act of Ansley & Co. which placed them beyond the order or control of the owners. The letter, under the circumstances, amounted to no more than an averment of readiness to pay to A., A. & Co. an *equal* amount of *similar* Confederate notes—equal on their face at the time the letter was written, but not made equal in value to the Confederate notes of A., A. & Co. at the time of the deposit in bank.

To conclude, Ansley & Co., having failed to adopt any one of the means suggested, by which they could have put the Confederate notes received by them for the sugars at the risk of the owners; but having converted them to their own use, as they did their own funds, and received value for them, it seems to me most unreasonable that *now*, when Confederate notes have become utterly worthless, Ansley & Co. are to be permitted to come into a Court of justice, and discharge themselves by payment in *similar* Confederate notes, *which* they happened to have on hand when the bubble burst.

MARCELLA J. SLAUGHTER, Administratrix of WM. M. SLAUGHTER, deceased, plaintiff in error, vs. BRYANT A. CULPEPPER and MATTHEW J. D. CULPEPPER, Executors of DAVID W. CULPEPPER, deceased, defendants in error.

Slaughter et. al. vs. Culpepper et. al.

- [1.] The Ordinance of 1865, on the subject of adjusting certain contracts upon the principles of equity, does not impair the obligation of contracts, and thereby violate the Constitution of the United States. It changes a rule of evidence; and, in so doing, is within the sphere of ordinary legislative competency. Whether the Convention that passed it had only *political* power, restricted to the creation of *fundamental, organic* law, was not, in this case, made a question, and is, therefore, left undecided.
- [2.] Juries can neither make contracts for parties, nor mould at pleasure those which they have made for themselves. They should, in administering the Ordinance of 1865, ascertain, from the evidence, fairly and honestly, what was, or must have been, the contract really made by the parties, and not substitute therefor any caprice or mere will of their own.
- [3.] The verdict in the present case appearing to be contrary to the evidence, and grossly unjust, a new trial was granted.

Motion for new trial. In Dougherty Superior Court.
Decided by JUDGE HANSELL. At Chambers, July, 1866.

Upon a rule nisi to foreclose a mortgage on land, granted at the instance of Culpepper's executors, against Slaughter's administratrix, a trial by jury was had in Dougherty Superior Court. The mortgage bore date December 5th, 1861, and was made to secure the payment of two promissory notes, of the same date, for \$7.875 each, one of them due January 1, 1863, and the other January 1, 1864, the latter bearing interest from January 1, 1863. It would seem, from the evidence, that these notes were given for land, sold at executor's sale, by the mortgagees, to Wm. M. Slaughter, the mortgagor.

It was in proof that the land sold low; that nothing was said as to the kind of currency in which it was to be paid for; that money was scarce; that the circulating medium at that time was bank bills; and that the person who cried the sale had never, until that day, seen any Confederate money, and then saw only one note, which a soldier, just returned from the army, paid to him. There was other evidence, but none which materially varied the foregoing.

The jury found for the mortgagees only \$11.812.50.

Whereupon the mortgagees moved the Court for a new trial, on several grounds; among them, because the verdict was contrary to equity, and contrary to evidence.

The presiding Judge granted a new trial, and this is assigned as error.

LYON & IRVIN, and DAVIS, for plaintiff in error.

STROZIER & SMITH, for defendants.

HARRIS, J.

[1.] By an assignment of error, upon the charge of the Judge before whom this case was tried, we are called upon to express an opinion, as to the constitutionality of an Ordinance of the Convention which assembled in November, 1865, to revise and amend the Constitution of Georgia. It is entitled, "An Ordinance to make valid contracts entered into and executed during the war against the United States, and to authorize the Courts of this State to adjust the equities between parties to contracts made but not executed, and to authorize settlements of such contracts by persons acting in a fiduciary character."

By the second Section thereof, it was ordained, "that all contracts made between the first day of June, 1861, and the first day of June, 1865, whether in writing, expressed or implied, or existing in parol, and not yet executed, shall receive an equitable construction, and either party, in any suit for the enforcement of any such contract, may, upon the trial, give in evidence the consideration and the value thereof at any time, and the intention of the parties as to the particular currency in which payment was to be made, and the value of such currency at any time; and the verdict and judgment shall be on principles of equity."

It has been argued that this clause of the Ordinance is violative of that prohibition in the Constitution of the United States, which forbids any State from passing any law "impairing the obligation of contracts."

We cannot think this clause of the Ordinance obnoxious to the objection. It does no more, really, than change a

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rule regulating the admission of testimony in Courts of law : it removes the obstacles created by technical rules to a full enquiry into, and investigation of, executory contracts made within the periods of time mentioned. It is apprehended, that to have done this, was within the competency of the Legislative power, itself, at any time. Who is prepared to deny that the Legislature may not, at its discretion, alter and amend old rules of evidence,—establish new ? Who, that it may not obliterate all distinctions which now characterize modes of procedure in Courts of law and Courts of equity, and to command, if they so enact, that the broad and liberal principles upon which justice is administered on the Equity side of our Superior Courts, shall apply to and control the verdicts of juries on its law side ?

The Ordinance was intended to do, in this matter, what we think the Legislature could have done. As no question, as to the extent of the *Legislative* power of a Convention—whether its power is other than political, and comprehending *only fundamental, organic law*—was made or discussed, we will not enter into this profound and high enquiry, but hold the Legislative power of the Convention as competent to pass such an Ordinance as that under consideration.

[2] We cannot think that, by allowing evidence to be gone into as to the consideration of a contract, and the value at any time, and the intention of the parties as to the particular currency in which payment was to be made, and the value of the currency at any time, the Convention designed to allow juries to scale, or cut down contracts, or to regulate and fix them, by any caprice or will of their own. Looking to the distress of the country, loss of property by the war, etc., to have authorized these, would have invested them with the power to make contracts for parties, a power which no Legislature or Convention could confer ; such power conferred, would be palpably unconstitutional. When juries attempt to make contracts for parties, or mould existing ones to suit their pleasure, they do impair their obligation, and such verdicts should be set aside.

As we interpret this Section of the Ordinance, the Convention meant to authorize the jury, from all the evidence by it permitted, to ascertain, fairly and honestly, what was, or must have been, the contract the parties made. Let us attempt to illustrate this idea. If it was a contract expressed to be paid in Confederate currency at a distant time, or if without any specification on its face to be paid in currency, but simply for the payment of so many dollars and cents, the jury should enquire into the consideration, what was sold, and its supposed fair value at the time of sale, in a currency at or near at par with gold or silver, or in gold or silver, so long as they furnish a fair standard of value, and have not become a mere marketable commodity, increasing in value from their scarcity, the increase of price stipulated for in consequence of the then existing depreciation of currency at the time of the contract, and from these, and all other facts, or circumstances, which can assist them in getting at the truth of the contract, should consider and equitably apply them in making up their verdict.

It occurs to me (and, I utter this only as my individual opinion) that no man, in making a sale of property on time, or by annual installments, during the late civil war, ever thought or intended to take the risk of a currency swelling daily in volume, and resting upon no metallic or other solid basis, and that risk to be incurred for legal interest only. A man so acting could be classed only with the insane. A person selling on time, no doubt, either agreed or meant to receive the currency existing at the time of payment, but at its then market value, as compared with the value of the currency when the contract was made. The creditor is fairly entitled to that difference, upon every principle of equity prescribed. The natural equity which the understanding approves, the impulse of an honest heart which prompts man to do as he would be done by, alike unite in sanctioning this measure of justice.

[8] By an examination of the record brought up, it appears that the executors sold the lands of Culpepper's estate.

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two thousand acres, on the 5th December, 1861, on a credit of one and two years, for the sum of \$15,750, in two equal payments. No Confederate currency was then in circulation in that quarter of the State; the few notes which had been seen there were held as "curiosities." Bank notes, those of the chartered banks of Georgia chiefly, constituted the entire circulating medium. It is a well known fact, (such is my recollection,) that all the banks at that time, save the Middle Bank of Georgia, had suspended specie payments; their notes were, consequently, depreciated in market, as compared with gold and silver, varying in the brokers' tables from four to nine per cent. discount.

Now, in the silence, on the day of sale, as to the medium in which payment was to be made, we are at a loss to discover how the jury could consider any question as to Confederate notes, there being none in circulation there. Under the testimony, they were restricted to the question, whether the notes of Slaughter were to be paid in gold and silver, or in bank notes; if in the latter, that being the circulating medium there, at what depreciation at the time of the sale, as compared with gold and silver.

If the jury, in this case, had reduced the amount of the debts sued, according to the depreciation of bank notes, as existing in December, 1861, their verdict should not have been disturbed. But, on what principle, and on what data, a debt of near twenty thousand dollars, principal and interest, has been cut down to \$11,812, I cannot discover.

The verdict in this case is unauthorized by the testimony, and seems to be grossly unjust. We therefore affirm the judgment granting a new trial.

Since writing out the foregoing opinion, I see, by a newspaper paragraph, that Chancellor Leanesne, of South Carolina, has held, in reference to contracts made during the civil war in *Confederate* currency, that they are to be discharged on the basis of the value of that currency, as compared with gold, *at the time* the debt was incurred, and consideration given therefor.

THOMAS S. POWELL, plaintiff in error, vs. JESSE BORING, defendant in error.

The evidence in this case showed a contract between the parties for a specific sum, and the Court committed no error in refusing to charge upon the subject of fraud.

Assumpsit. In Fulton Superior Court. Tried before Judge WARNER. October Term, 1866.

In 1857, Dr. Boring, the defendant in error, was one of seven Professors constituting the Faculty of the Atlanta Medical College. The College was a corporation, chartered by the State of Georgia, and the land upon which the College building stood was vested in Trustees. The building and apparatus had been paid for by the Dean, of the Faculty—partly out of funds which came into his hands from the fees of students, which was the common property of all the Professors, and partly out of money borrowed by the Dean on his own credit. The amount thus expended out of fees was \$957.00 to the share of each Professor; and as matters stood, the aggregate sum constituted a debt in favor of the Professors, as a body, against the Trustees of the corporation, and was secured, or to be secured, by a lien upon the College property. The Dean was, himself, one of the Professors and the common agent of all the Faculty for receiving and disbursing money. Fees of students were paid to him, and when not paid, notes were given therefor, payable to him as Dean. The notes remained in his hands, undivided, to indemnify him for the money borrowed on his own credit, and expended as above. Collections made upon them, from time to time, were subject to be applied to that debt. The share of each Professor in these notes amounted, in October, 1857, nominally, to twelve or fifteen hundred dollars, but some of the notes were worthless. Another item of property which the Faculty owned in common, was a Medical Journal, conducted by the Professors, without direct pecuniary profit, but for the notoriety which it gave to the College, and the resulting incidental benefits to the Faculty.

On the 18th of July, 1857, Dr. Boring, writing from La-Grange, addressed a letter to Dr. Powell, at Sparta, from which the following is an extract:

"I am in doubt as to my future course, but am fixed in my purpose that I will not, longer than the close of the present session, work for bricks and mortar, while my family and creditors are the sufferers thereby. I am pretty well determined to visit Texas the coming winter, and now think I shall settle there. My inclination is to settle in Galveston and go into the Drug business. I must do better than I am now doing. Suppose I manage to divide my Chair, and tender you the Diseases of Women and Children, I continuing in that of Obstetrics. Could you—would you, take all my College property, leaving me simply Professor in that department, but not a property holder. I could and would still fill my course, even from Texas, in case my colleagues should think it best for the College. My entire interest at the close of the present year will probably amount to \$1500 to \$1800."

Dr. Powell replied to this letter on the 22d of July, saying: "I am sorry you are so much inclined to go West, and hope it can be made to your interest to continue your connection with the College; and if my buying your interest in the College building, &c., &c., will enable you to do so, you can rest assured I will make the effort, if"—(going on to express conditions as to the consent of the other members of the Faculty, to a division of the chair, and as to the distribution of fees.) * * * "By this arrangement you would only be out the interest of half of the amount I give you for your interest in the College, &c. I would like for you to write me the cost of the College, &c., and the amount that will cover your entire interest, &c. * * The whole matter is now in your hands. If you can make the arrangement, I will raise the money."

On the 24th of September following, Dr. Boring wrote to Dr. Powell, that he had forwarded his resignation to the Faculty, and had recommended Dr. Powell to them to fill

his chair, adding: "In the event of your election, I desire, as soon as practicable, to close the business, as I am directing my plans and movements for Texas, the coming winter."

Dr. Powell replied on the 30th of September, saying, among other things: "As soon as I am informed of my election, and of the amount I am to pay you, I shall go to work to raise it."

On the 6th of October, Dr. Boring wrote Dr. Powell, that he had, at the request of the Faculty, reconsidered his resignation, but had determined to repeat the tender of it, and would so write the Faculty that night. He added: "I am preparing to leave for Texas, on an exploration trip, about the 6th of November, and expect to remove in the winter. My property and claims in the College will cost \$2,500. I have drawn nothing from the last Lectures, (amounting to \$1,600-\$1,800,) and but a part from the two preceeding sessions. The whole is really more than \$2,500, but will not all be realized, yet, the property and place are worth more. In view of all the circumstances, I have determined to make a total transfer of property, notes and all, and to put them at \$2,500, as a fair medium value. This amount I must realize the coming winter, or have it so as to answer the purposes of money."

On the 23d of October, Dr. Powell wrote to Dr. Boring, saying that he had just returned from Atlanta, and read Dr. Boring's letter; that the Faculty had accepted the latter's resignation, and agreed to recommend the former to the Trustees to fill the chair.

On the 31st of October, he wrote again to Dr. Boring, as follows: "I received to-day the announcement of Lectures in the Atlanta Medical College for the Session of 1858, with my name inserted as Professor of Obstetrics, and I presume by that, all is right; and I am now trying harder than any poor fellow you ever saw, to raise you some money." And on the 3d of November, he wrote as follows: "Dr. Westmoreland informed me that the amount of money you have in the College building is \$957.00, and as I presume y-

in want of money, I have enclosed you a check on the Planters' Bank of Savannah for that amount, for which you will please send me your receipt. I trust you will soon be free from pecuniary troubles, and that you may succeed in all your new plans."

Dr. Boring enclosed to Dr. Powell, on the 9th of November, a receipt for this remittance, the receipt expressing that it was in part payment for his interest in the property, "real and perishable" in the Atlanta Medical College. At the same time, he wrote thus: "Allow me to suggest that it may be well for us to complete the arrangement of our business, especially as I am aiming, as soon as possible, to bring my business to a close in this country. You can forward your note or notes, maturing at or about the 25th December next, and I will forward you a transfer of my College interest, real and perishable.

In reply to this letter, Dr. Powell wrote on the 16th of November: "I have requested the Dean to furnish me and yourself a full and clear statement of your real and tangible interest in the College, and furnish me with the amount yet due you. As soon as I hear from him, you shall hear from me."

Some further correspondence followed, in which Dr. Boring alleged, that in all the negotiations, written and verbal, he had, whenever the terms were alluded to, put his interest at a stipulated price, and that Dr. Powell had never intimated an objection. He stated, also, that the check sent to him was still in his hands, undrawn, and must remain so, until the necessary transfers were made. Dr. Powell, on his part, expressed regret that a misunderstanding had occurred. He said that, in offering to take Dr. Boring's interest in the College, if elected, he meant that he would refund the amount Dr. Boring had paid in for the College-building, apparatus, etc., and never supposed, for a moment, that he would be expected to cash his portion of the notes; that he never, until recently, knew there were any notes due for tickets, and that it was a new idea to him, as he presumed it was to any Doctor who had graduated ten years previously,

for students to attend medical lectures on a credit; that, as to what was due Dr. Boring from the proceeds of the last lectures, he supposed the latter would settle that with the Dean; and that he, himself, expected to settle by the books, not understanding that he had purchased at any specific sum. He offered, finally, to submit the whole matter to the Faculty, and to resign if they did not sustain his construction of the transaction. He closed, by requesting Dr. Boring to hand the check to Dr. J. G. Westmoreland. The correspondence, so far as it appears, concluded with a letter from Dr. Boring, dated March 23, 1858, declining a reference to the Faculty, and proposing an arbitration before five men, two to be chosen by each party, and the fifth by these four.

In September, 1860, the present action was brought by Boring against Powell, to recover \$1,543, the balance of \$2,500, after deducting the \$957 paid and receipted for as above.

At the trial, the foregoing matters, with some others less important, appeared in evidence. It also appeared that Powell retained Boring's Chair in the College; that he exercised the rights of a member of the Faculty with respect to the Medical Journal, and that an appropriation was made by the State, which enabled the Trustees of the College to pay its debts, one of which was the claim of \$957 in favor of Boring, for his share of the expenditures towards erecting the building, etc., and that the money due on this claim was paid to and received by Powell. It further appeared, that some time after Boring went out of the Faculty, and Powell went in, a division was made of the notes held by the Dean, and that the share set apart to the Chair of Obstetrics, (some twelve or fifteen hundred dollars in amount, as stated heretofore,) remained in the Dean's hands, never called for by either Boring or Powell. Also, that the Dean, at the time of the trial, had collected upon these notes, after the division, from one to four hundred dollars.

Counsel for Powell requested the Court to charge the

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jury, that if they believed there was a contract made, and the defendant was induced to make it by the fraudulent representations of Dr. Boring, as to the value of the assets of the College, when Dr. Boring had a better opportunity of knowing their value than Dr. Powell, the parties thereby treating upon unequal terms, it was a fraud upon the defendant, and he is relieved from further performance. The Court refused so to charge; and, after verdict for the plaintiff, the defendant moved for a new trial, on the ground of such refusal, and because the verdict was contrary to the evidence, and to the weight of the evidence—also, because the plaintiff, if a contract was made, did not comply with the same by turning over the notes and assets in question, or by offering to do so.

A new trial was refused, and this is complained of.

HAMMOND & MYNATT, for plaintiff in error.

HAMMOND & SON, and BLECKLEY, for defendant.

LUMPKIN, C. J.

This bill of exceptions is brought by Dr. Powell, through his counsel, to reverse Judge WARNER's decision, in refusing a new trial in this case.

Dr. Boring was one of the Faculty of the Medical College at Atlanta, and, as such, had an interest in the site, buildings, with the appurtenances; and, also, was joint owner of sundry notes, given by the students for their professional tuition. These notes were held by Dr. Westmoreland, as Dean of the Faculty, for the use of the Faculty. The Faculty were also the proprietors of a Medical Journal, published, not so much for the pecuniary compensation it yielded, as the reputation which it brought to the Institution.

Dr. Boring having determined to go West, he and Dr. Powell commenced a negotiation, which was conducted by a correspondence between them, which is spread out in this

record. It resulted in this litigation. Dr. Boring claims that he sold out his property and place in the College for \$2,500; that Dr. Powell paid him \$957, and this suit is brought to recover the balance of the purchase money.

Dr. Boring wrote Dr. Powell on the 6th of October, 1857, stating that he had determined to go to Texas; that his property and claims in the College would cost \$2,500. Dr. Boring also stated in this letter, that he had drawn nothing from the last lectures, (amounting to \$1,600 or \$1,800) and but part from the two preceding sessions; that the whole property was really worth more than \$2,500, but it would not all be realized, yet that the *property* and *place* were worth more; that, in view of all the circumstances, determining to make a total transfer of property, notes and all, and to put them at \$2,500, as a fair medium value. This amount, he stated, he must realize, the coming winter, or to have it so as to answer the purposes of money.

On the 23d of October, Dr. Powell wrote, saying that he had just returned from Atlanta, and that he had read Dr. Boring's letter; that the Faculty had accepted Dr. Boring's resignation, and had agreed to recommend Dr. Powell to the Trustees to fill Dr. Boring's Chair. On the 31st of the same month, he wrote again, as follows: "I received to-day the announcement of Lectures in the Atlanta Medical College, for the session of 1858, with my name inserted as Professor of Obstetrics, and presumed all was right; and I am now trying harder than any poor fellow you ever saw to raise you some money." On the 3d of November, he wrote as follows: "That the amount of money you had in the College building is \$957, and as I presume you are in need of money, I have enclosed you a check on the Planters' Bank of Savannah for that amount, for which you will please send me your receipt." (This would have been the share of Dr. Boring of the appropriation made by the State, to discharge the debt which the Faculty had incurred in establishing this Institution; and it was paid over to Dr. Powell under his purchase from Dr. B.) "I trust you will soon be free

from pecuniary troubles, and that you may succeed in all your new plans."

On the 9th of November, Dr. Boring inclosed a receipt for the remittance, the receipt expressing that it was *in part payment* for his interest, *real* and *perishable*, in the Atlanta Medical College. At the same time he wrote thus: "Allow me to suggest, that it may be well for us to complete the arrangement of our business, especially as I am anxious, as soon as possible, to bring my business to a close in this country. You can forward your note, or notes, maturing at, or about the 25th of December next, and I will forward you a transfer of my College interest, real and perishable." And now, for the first time, Dr. Powell intimated his surprise, that Dr. Boring should have understood him as agreeing to pay any *specific sum* for the purchase, and especially, that he should be supposed to have included the fee notes of the students in the contract.

If this was not the proposition submitted by Dr. Boring, and accepted by Dr. Powell, we ask what did he purchase? This was the distinct offer made him by Dr. Boring, and accepted, impliedly, at least, as strong as language could express it. All the subsequent arrangements seem to have been predicated upon this understanding, and many things that afterwards transpired, will be found meaningless, upon any other hypothesis.

Dr. Powell complains that Dr. Boring, in whom he implicitly confided, abused his confidence and misled him, either willfully or through ignorance, and that especially he misrepresented the amount of fee notes owing to him. This is rather strange, when in one of his letters, Dr. Powell states, that he never supposed, for a moment, that he could be expected to cash Dr. Boring's portion of these notes. That he never knew, until recently, there were such notes. That it was a new idea to him, that students could attend Lectures on credit. How to reconcile this with the letter of Dr. Boring, written on the 6th of October, is rather inexplicable. In this letter Dr. Boring says: "I have determined to make

a total transfer of property, *notes* and all, and to put them at \$2,500, a fair medium value," and it will be recollected, that Dr. Powell was in Atlanta, when this letter was written. The Dean of the Faculty, Dr. Westmoreland, held these notes, and it must be supposed that Dr. Powell could learn from him and other members of the Faculty, the true condition of the College, its future prospects, &c. He was greatly negligent, if he failed to do so, and having access to reliable information, upon this and all other subjects connected with the College equally so with Dr. Boring himself—he cannot impute either fraudulent representations, or concealment to Dr. Boring.

It may be that neither of these gentlemen are very shrewd in money matters—it is no disparagement to them to say so. It must be recollected, also, that many of the fee notes, supposed to be good at the time, have been lost by the great financial crash which shortly afterwards ensued. The times, unparalleled in the history of our country, may have had much to do with the dissatisfaction attending this transaction.

We cannot condemn the presiding Judge for refusing to give the charge as requested by defendant's counsel, and therefore affirm the judgment of the Court below, in not granting a new trial.

Judgment affirmed.

 Hoyle et. al. vs. Jones, adm'r.

PETER F. HOYLE, JOHN W. NESBIT, THOMAS R. HOYLE, ANDREW H. HOYLE, and SARAH E. HARDMAN, plaintiffs in error, vs. THOMAS H. JONES, administrator of MARGARET H. JONES, deceased, defendant in error.

- [1] A bequest to a woman, "and to the children of her body," creates a joint estate, and not an estate tail.
 [2] The concealment of a right, by one whose duty it is to disclose it, prevents the running of the statute of limitations in favor of the party in default. It is a legal fraud.
 [3] It was not error in this case, to allow interest on the annual hire as it accrued.

In Equity, in DeKalb Superior Court. Bill, &c. Tried before Judge WARNER. October Term, 1866.

Peter Fite, of North Carolina, died there in 1817, leaving a will, the sixth item of which was as follows: "I will and bequeath to my daughter, Catherine Hoyle, and to the children of her body, a negro woman named Polly, with said Polly's offspring."

Catherine Hoyle was the wife of Adam Hoyle, who was one of the executors to this will. Catherine died a few days after her father, the testator, leaving several children, all of whom were in life at the making of the will, as well as at the death of the testator. Among them was Margaret H., subsequently the wife of Jones, the defendant in error. She was born in 1810, married Jones in 1828, and died in 1837. Her marriage took place in Gwinnett county, Georgia, whither her father, Adam Hoyle, had removed from North Carolina, shortly before; and where she continued to reside until her death. Neither she nor her husband, so far as appears, ever knew, during her life time, of the provisions of Peter Fite's will, or anything touching her rights under it; nor did Jones subsequently acquire this knowledge until shortly before the present litigation commenced. It was admitted by Adam Hoyle, in his answer, that he never communicated such knowledge to either of them.

Soon after the death of Peter Fite, in 1817, Adam Hoyle, with the consent of his co-executor, took possession of the woman Polly, claiming her, under the will, as his own pro-

perty, in right of his wife, Catharine, being advised by counsel that she was his absolutely, and that his children had no interest in her. When he removed to Georgia, he brought Polly with him, and continued to hold her as his own in the county where Jones and wife lived. She bore many children, and these he disposed of in various ways. He sold some of them to strangers, and some, together with Polly herself, to his son, Peter F., one of the plaintiff's in error. He gave off others to the other plaintiff's in error, who are his sons, his son-in-law, and his daughter. These transfers took place at various periods, extending from 1841 to 1853, inclusive; and those to whom he sold, or gave the negroes, held them thenceforth as their own property. They increased, from time to time, until the descendants of Polly became about forty in number.

In December 1860, Jones applied for, and obtained, temporary letters of administration upon the estate of his deceased wife, Margaret H. In February following, he obtained permanent letters. Between these two periods he filed his bill, as administrator, against the plaintiffs in error, and Adam Hoyle, praying for a partition of the negroes in their possession, (claiming one-sixth thereof,) and for a full and fair accounting for hire, with interest thereon, and also for general relief.

The cause came on for trial at October Term, 1866, when Adam Hoyle being dead, and his estate unrepresented, it was agreed by counsel, that the trial proceed as though he were in life, his answer to be read in evidence but no decree to be taken against him.

The answers and some other evidence being before the jury, the Court charged them as follows:

On the Will.—That it did not create an estate tail, but a joint estate in Catharine Hoyle and her children.

On the Statute of Limitations.—That if Mrs. Jones, the complainants intestate, was an infant, under twenty-one years of age, at the death of Peter Fite, and became a feme covert before arriving at twenty-one years of age, and

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before the cause of action accrued, and before the statute commenced to run against her, and died during her coverture, the statute of limitations did not bar the complainant's right to recover—that after her death the statute did not run until there was a legal representative of her estate capable of instituting suit; that the act of 1856, requiring administration on decendant's estates to be taken out within five years, did not have any retroactive effect, but operated prospectively, to-wit, from the 1st of June, 1856, and that the complainant had five years from that day to take out administration, before his right to do so would be barred by the provisions of that act. Also, that if the defendants and those under whom they claimed, had been guilty of a fraudulent concealment of the complainant's intestates right to the property in controversy, by which the complainant, or his intestate, had been debarred or deterred from commencing suit for the property, the statute of limitations would not commence to run only from the time of the discovery of such fraud.

On interest upon hire.—That if the jury found any hire to be due, they might allow interest upon it at seven per cent. per annum, from the time it became due; that it was due from the expiration of each year; and that the interest allowed should not be designated in the verdict as interest, but be included in the general amount found against each defendant.

On the effect of emancipation.—That this, if the defendants were *bona fide* claimants, and not wrong doers, was the same as if the property had died or been destroyed, and might be considered by the jury in fixing the amount of their verdict; that the bringing of the action was a demand by complainant for his interest in the negroes, and if the defendant's refused to account for his interest, and held the same not in good faith, then the subsequent emancipation of the negroes was no valid reason why they should not be required to account for the value.

These charges are each assigned as error, the first three

generally, and the last as being inapplicable to a bill praying that the negroes be divided, and not praying for any account of their value.

CANDLER and CALHOUN, for plaintiff's in error.

HAMMOND & SON, and BLECKLEY, for defendant.

[1] Under the sixth item of Peter Fite's will, Catharine Hoyle and her children took a joint estate; no estate tail was created thereby. *Jackson vs. Coggin* 29 Ga. R. 403.

[2] The Code, Sec. 2872 says: "If the defendant, or those under whom he claims, has been guilty of a fraud by which the plaintiff has been debarred or deterred from his action, the period of limitation shall run only from the time of the discovery of the fraud;" and see also Sec. 2647, where similar language is used. Here all the defendant's held under Adam Hoyle; he was the executor of Peter Fite's will; it was his duty to administer the estate according to the terms of the will; he should have paid to Mrs. Jones what was due her under that will; he was her trustee, and bound to act in good faith. Instead of doing this, he set up title to this property in himself; never informed his children of their rights under the will; and complainant never learned, until a short time before instituting proceedings in this case, that the will gave anything to Catharine Hoyle's children. This concealment on the part of Adam Hoyle, however good his intentions may have been, is in law a fraud, and such as will prevent the running of the statute in his favor, or those claiming under him, against his *cestui que trust*. This view disposes of several questions made in this case. It is unnecessary to decide anything as to the disability of Mrs. Jones to sue, for under the view which we take of the case, if she had never married, and were in life at this time, she would have a right to maintain this bill; her right to recover depends, not on the disability to sue, but on the fraudulent concealment, by this trustee from his *cestui que trust*, of a knowl-

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edge of her rights. It was his duty to inform her, and assert her rights; instead of which, he concealed from her a knowledge of the fact that she had any rights at all; and appropriated to his own use the property, to which she was entitled under the will of her grand-father. See *Wellborn vs. Rogers*, 24 *Ga. R.* 579 to 581.

[3] We think the Court properly instructed the jury, that complainant was entitled to interest on the hire, to be calculated on the amount of the hire due at the end of each year. In *Huff & Chambers vs. McDonald*, 22 *Ga. R.* 131, the Court decides, that if one joint tenant, or tenant in common receives and uses more than his share of the joint effects, he is liable to account for at least as much as the legal interest on the amount so received. In *Robinson, et al, vs. The Bank of Darien, &c.* 18 *Ga. R.* 107, Lumpkin, J. says: "The right of the creditors to the rents which accrued on the real estate, during the period the lands were controlled by the Central Bank, would seem to us to be indisputable, upon the plainest principles of justice. And that *interest* should be paid on the proceeds of the real estate sold in Georgia, *and upon the annual rents*, from the times these sums were respectively received, would seem to follow as a necessary consequence." See, also, *Doonan vs. Mitchell*, 26 *Ga. R.* 479. Certainly the rule that hire is payable *annually* is one of which defendant's cannot complain; and when due and unpaid it should bear interest. This is equitable and just.

The view which we have taken renders it unnecessary to say anything upon the charge of the Court below upon the effects of emancipation in this case, except that we see no error of which the *defendants* can complain. It certainly was as favorable to them as they could legally require.

Judgment affirmed.

J. E. MARTIN and E. JOHNSON, plaintiffs in error, vs. C. H. BLOOD, defendant in error.

In April, 1863, a bill enjoining a certain *f. fa.*, and appointing a Receiver, was dismissed, on the ground that the complainant was an alien enemy. At the next Term of the Court, certain orders were passed, directing that the *f. fa.* proceed, and disposing of the assets held by the Receiver. At October Term, 1866, the complainant moved to reinstate the bill, and set aside said orders. Held, that there was no error in granting his motion.

Motion to reinstate case. Decision by Judge VASON. In Decatur Superior Court. October Term, 1866.

At the April Term, 1863, the case (in Equity) of Caleb H. Blood against James E. Martin, E. Johnson, *et al.*, was dismissed, on the ground that the plaintiff was an alien enemy. At the next Term of the Court, in the same case, it was ordered, that the *f. fa.* enjoined proceed; and, further, that the Receiver pay over, on said *f. fa.*, the funds in his hands, and that the notes be turned over to the plaintiffs, and entered as a credit on said *f. fa.*

C. H. Blood, at October Term, 1866, sued out a *rule nisi* to rescind the orders mentioned, and to reinstate the case.

In answer to the *rule nisi*, plaintiffs in error said :

1. The case dismissed restrained them from proceeding with their *f. fa.*, and was, under the circumstances, rightfully dismissed. Blood had notice of the proceedings and the judgment.

2. The order passed was but the order of the Chancellor, disposing of funds in his own hands; and Blood, being an alien enemy, was not entitled to notice.

3. It is now too late to reach the case by a motion of this sort; the remedy is by a motion for a new trial, or in arrest of judgment.

4, 5, 6. It is now too late to arrest the judgment. It has been executed, and the rights vested cannot be disturbed.

The Court ordered the *rule nisi* to be made absolute, and the case reinstated; and also that the order (as to the Re-

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ceiver, etc.,) above set forth, be set aside; and counsel for plaintiffs in error excepted.

SIMS & CRAWFORD, for plaintiffs in error.

LYON & IRVIN, for defendant.

HARRIS, J.

In this case, there is an entire concurrence of the Court in affirming the judgment below, ordering the cause in Equity to be reinstated, though we arrive at that conclusion by different routes. The majority of the Court place their judgment upon an unpublished decision made during the war, and the Ordinance of the State Convention providing for the reinstatement of cases upon the affidavit of party plaintiff. In my view, the moment it was made to appear by plea, that Blood was an alien enemy, all orders or proceedings in the case, afterwards, were illegal. In legal contemplation, he was civilly dead; he had no right then to sue, and was incapable of being sued. Moreover, when the State of Georgia became a member of the Southern Confederacy, her right, as a sovereign, to sequester, for public use, the property of an alien enemy, devolved on the Confederate Government; and all action thereafter, by the State Courts, should have been suspended until a Receiver, duly authorized by the Confederate Government, should have been made a party to the cause. The course of procedure, as disclosed by the record, of making orders in the cause, when there was no legal party plaintiff, was not simply irregular, but all such orders were void *ab initio*.

Judgment affirmed.

THE COMMISSIONERS OF SUMMERVILLE, plaintiffs in error, vs.
ROBERT A. REID, and others, defendants in error.

- [1.] On motions to dissolve injunctions, whether made in Court at Term time, or to the Judge in Chambers, the party moving is entitled to open and conclude the argument.
- [2.] Upon the merits of this controversy, and without copying them, referring to the documents set out in the pleadings, we hold, (1) That the arrangement between the corporations, to-wit, The Commissioners of Summerville and the Trustees of Summerville Academy, is no violation of the Charter of Summerville Academy. (2) That its Trustees were authorized to lease the premises, for the use intended, to the Board of Commissioners of Summerville. (3) That the contract is not in violation of the intention of Mr. Cumming and wife, who founded the Academy by a donation of the lot. (4) That it is not a breach of any covenant which the Trustees entered into, with the Richmond County Academy, under which they hold as leasees. (5) That the supplementary lease of July 1st, 1866, is not a reconveyance of the premises, and does not defeat the lease. (6) That the contract between the two Boards is supported by sufficient consideration, and is advantageous to both parties, on the one hand saving the existence of the Academy, and, on the other, greatly promoting the convenience of the Board of Commissioners, as well as the village of Summerville.
- [3.] The Rule in Equity, that the appellate Court will not control the discretion of the Court below, except flagrantly violated, does not apply, where the judgment of the Court below is founded upon a misapprehension, or misconstruction, of the meaning of certain documentary evidence.
- [4.] Where an injunction has been granted, and it is apparent to the appellate Court, that there is no Equity in the Bill, and that the aspect of the litigation cannot be materially changed, it will not only direct that the injunction be dissolved, but also that the bill be dismissed.

Motion to dissolve injunction. Decided by Judge Hook.
At Chambers. October, 1866.

On the 13th of August, 1818, Thomas Cumming conveyed forever to the Trustees of the Richmond Academy, a certain lot, or tract of land, in the village of Summerville, "for the purpose of erecting thereon an Academy and such other buildings and improvements as the Trustees and their successors in office may see fit."

On the 12th of April, 1865, Ebenezer Starnes, Benjamin F. Hall, and several other inhabitants of the village of Summerville, presented their petition to the Inferior Court of Richmond County, reciting, "That upon said lot a structure has long since been erected, to be used, and which has been used, as an Academy, and certain other houses, etc., to be used by persons connected with such Academy; that for several years past, little or no attention has been given, by the

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Trustees aforesaid, to the said premises, which are now very much out of repair, and as little attention to the cause of education in connection with said property; that your petitioners, as residents of said village, are more immediately interested in the cause of education there, and are willing to receive, control, and repair the said premises with reference to the purposes for which they were designed; that said Trustees are willing to transfer their right and title to them to your petitioners for these purposes, if your petitioners can be incorporated;" and praying that the petitioners and their successors in office might be incorporated by said Inferior Court, by the name and style of The Summerville Academy, for the purpose of receiving and holding the same, and all other property which they might desire to hold, to be used for the purposes of education in said village, and that they might have granted to them all such corporate franchises and privileges as are usual in such cases, and as might be expedient and proper for them in exercising and carrying into effect the objects of their association.

Upon this petition, the Inferior Court, on the day last mentioned, granted an order incorporating the petitioners and their successors in office, as The Summerville Academy, for the term of fourteen years; and declaring them capable to hold any property, real or personal, by gift, transfer, or purchase, which may be expedient and proper for the exercise of their duties in promoting the purposes of education in said village, and for the convenient and beneficial administration of the objects of their association; also, declaring them clothed with all the powers, franchises, and privileges usual in such cases, and which might be expedient in carrying the objects of their association into effect, with power to make by-laws, etc.

On the 13th of June, 1865, the Trustees of the Richmond Academy, leased to the Summerville Academy, for the term of ninety-nine years, the premises conveyed by the aforesaid deed of Thomas Oumming, together with the Academy and other buildings thereon erected, "with all the incidents and

privileges by said deed conveyed and secured" to the said Trustees of the Richmond Academy: the Summerville Academy covenanting to keep and maintain the premises for the purposes of education in said village, such as were contemplated by the founder of said Academy, and for the purpose of lodging and accommodating the teachers, their families, etc., who may be connected with said Academy, and to this end, so long as the premises are needed and can be used for these purposes, to keep them in proper repair; and, also, to pay all taxes and rates thereon, and at the end of said term, to deliver up the same, if required, reasonable wear and tear, and damage or destruction by fire or other providential cause, excepted.

On the 2d of April, 1866, the Commissioners of the Village of Summerville passed the following resolutions:

"In view of what appears to be the unanimous wish of the tax payers of the village of Summerville, namely, that the property appertaining to the Summerville Academy be leased to the Board of Commissioners of said village, and it appearing that the Board of Trustees of said Academy are willing to make such transfer:

"*Resolved*, That the Board consent to receive said property, and hereby request the Intendent of this village to prepare such papers as may be necessary in order to legalize and perfect such transfer.

"*Resolved*, That sufficient funds be raised to enable the Board to defray existing liabilities, and such other sums as may be required to meet current expenses.

"*Resolved*, That the Intendent be authorized to execute said lease, and to sign and seal the same as for this Board.

"The Clerk presented digest with the assessment of real estate for present year, and it appearing to this Board that the assessed value of the real estate, by the assessors for said year, is \$489,150; On motion, *Ordered*, that the rate of tax be fifty-five cents on the one hundred dollars of said assessed value."

On the 13th of May, 1866, the Trustees of the Summer-

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ville Academy executed to The Board of Commissioners of Summerville, a lease for ninety-eight years, of "such and so much of that messuage, lot, or parcel of ground situated in the village of Summerville, in said State and county, known as the Summerville Academy and Academy lot, as the said Board of Commissioners, parties of the second part, may desire to use as a Sessions room, or place of meeting for said Board of Commissioners, and for the public purposes of said village:" the said Board of Commissioners covenanting to keep and maintain such portion of the premises as may be used by them for the purposes aforesaid, in reasonable tenantable repair, to pay taxes thereon, and at the end of the term, to deliver up the same, if required, reasonable wear and tear, and damage or destruction by fire or other providential cause, excepted; and, further, to pay and discharge the balance of the bill now due and owing by the said Trustees for and on account of the repairs which have been placed upon said premises, not to exceed the sum of two thousand dollars.

The Commissioners of Summerville being about to enforce the collection of the aforesaid tax, a large part of it for the purpose of complying with the last stipulation in the foregoing covenant, the defendants in error, a portion of the freeholders and tax payers of the village, filed their bill in Equity, praying for an injunction against the collection of so much of said tax as was designed for that object.

On the 26th of June, 1866, Judge Hook sanctioned the bill and ordered the injunction to issue.

Afterwards, on the 30th of July, 1866, the Commissioners of Summerville passed the following:

"This Board having been informed that it is admissible that the agreement made by this Board with the Board of Trustees of Summerville Academy, at the time of the lease, to the effect that the portions of the building conveyed to the Board, should not be so used as to interfere with the use of said Academy for educational purposes, or with the duties and obligations of said Trustees, arising out of the

foundation deed of Mr. Cumming, the deed of the Trustees of the Richmond Academy, or the Charter of said Summerville Academy, should be reduced to writing :

It is, therefore, Resolved, By this Board of Commissioners, that the Intendent be instructed to execute for this Board a deed of covenant in favor of the Trustees of Summerville Academy, or such other instrument as may be deemed expedient and proper, for the purpose of putting the agreement with them, as to the use of these rooms, in writing and under seal."

Accordingly, the Intendent, one day thereafter, executed the covenant thus provided for.

After answering the bill, and after giving ten days notice of their intention so to do, the defendants moved before Judge Hook, at Chambers, to dissolve the injunction. At the hearing of this motion, their counsel claimed the right to open and conclude the argument. The Judge decided that the right in question belonged to counsel for the complainants, and this is assigned as error.

The Judge, after hearing the argument, refused to dissolve the injunction, and this, also, is assigned as error.

JOHNSON, for plaintiffs in error.

BARNES & CUMMING, and GANAHL, for defendants.

LUMPKIN, C. J.

The first ground of error complained of in this case is one of practice. The Judge decided, that on a motion to dissolve an injunction, complainants' counsel were entitled to open and conclude the argument. It seems to be now the English rule, and the general practice throughout this State, so far as we know or are advised, that the party moving to dissolve, opens and concludes the argument, whether the motion be made in open Court or in Chambers ; and this practice is shown to be founded on principle, from the very able

and conclusive argument submitted by Governor Johnson on this subject.

The next and only other error complained of is, in the the Court's deciding to hold up this injunction. This involves the whole merits of the controversy between the parties.

We think the injunction should have been dissolved by the Court, and the bill dismissed. It is admitted by the Solicitors for the tax-payers, that the authorities of Summerville had power to levy the tax which they imposed. They also disclaim having intended to impute moral fraud to the Trustees of this Academy, or the Commissioners of the village, who are pretty much one and the same persons. It is not pretended that any person, in behalf of the original donor of this property, Thomas Cumming, deceased, is here, complaining of the abuse or perversion of his donation—neither are the Commissioners of the Richmond Academy, who leased the property to the Trustees of Summerville Academy, finding fault of what has been done. Who, then, are complaining? Some of the tax-payers of the village of Summerville, for being taxed to raise money to repair the Academy, which was greatly dilapidated, and for which gratuitous contributions could not be procured. These are the persons who grumble at this arrangement, intended for the double benefit of furnishing educational means for the community, and also accommodations for municipal and other public purposes to the village.

The Judge seems to put his judgment wholly on the leases which have been used to convey this property, and has come to the conclusion, that a legal fraud has been perpetrated by their means, and, therefore, concludes to hold up the injunction; whereas, in our view of these documents, we think we should not only have dissolved the injunction, but also dismissed the bill. This is not one of the cases where this Court will not interfere with the discretion of the Court below unless it has been flagrantly violated.

We hold that His Honor misapprehended the design and

effect of these papers. For instance, we hold that the supplementary instrument made by the municipality of Summerville, instead of reinvesting Summerville Academy with all the rights which the former had conveyed by the previous lease, served only to explain what might be considered doubtful in the previous lease.

Read the papers in this case carefully, and there is the design, steadily adhered to from the beginning, to maintain the purpose for which this endowment was made by Mr. Cumming. And as to the Trustees of the Academy being censurable for reimbursing themselves out of their own Treasury, for moneys which they had advanced to make the necessary repairs, we see nothing wrong in that, but the evidence of a praiseworthy liberality in furnishing, from their private means, funds to save the building from decay and ruin; and whether they will apply these taxes, raised to pay for these repairs, to their own use, or to donate it to widows and orphans to pay their taxes, is a matter entirely for their own decision, and with which nobody has the right to interfere.

Concurring, as we do, in the following conclusions, at which the plaintiff's counsel arrived, namely: "That the arrangement between the corporations is no violation of the charter of the Summerville Academy; that its Trustees, under the incidental power which the law attaches to all corporations, were authorized to lease the premises, for the use intended, to the Board of Commissioners of Summerville; that the contract is not in violation of the intention of Mr. Cumming and his wife, who founded the Academy by a donation of the lot; that it is not a breach of any covenant which the Trustees entered into with the Richmond County Academy, under which they hold as lessees; that the supplementary deed of July 1st, 1866, is not a reconveyance of the premises, and does not defeat the lease; that the contract between the two Boards is supported by sufficient consideration, and is advantageous to both parties—on the one hand, saving the existence of the Academy, and on the other, greatly pro-

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moting the convenience of the Board of Commissioners, as well as of the village of Summerville;”

And believing that the aspect of this litigation, depending, as it does, upon documentary evidence, and to save further expense and harrassment, we reverse the judgment of the Court below, in not dissolving the injunction, and further direct that the bill be dismissed.

Judgment reversed.

BOB. McMILLAN, (a person of color,) plaintiff in error, vs.
THE STATE OF GEORGIA, defendant in error.

[1] To make a homicide murder, malice must exist at the time of the killing.

[2] Unless the finding of the Jury be clearly wrong, this Court will not disturb the verdict.

[3] The verdict in this case was not contrary to the evidence.

Murder. In Macon Superior Court. Tried before Judge COLE. September Term, 1866.

The plaintiff in error was tried for the murder of Dianer Holcombe, a woman of color.

Evidence for the State.

Mack Felton, colored—Knows the prisoner, and points him out. Was waked by his wife about twelve o'clock at night on the 29th of July last (1866.) Judge came round to his house, calling him. We turned in the direction of the calling, and met the deceased, Dianer, with her throat cut, at the corner of the house occupied by deceased. She came to his steps and sat down, where she remained till she died. She lived three or four minutes. About one-quarter of an hour afterwards, he went into the house of deceased, and found Bob with his throat cut. No one occupied the house

of deceased but Dianer and Bob and Dianer's children. Bob did not seem badly hurt at first, but, after a while, began to act like he was dying. Dianer's son, Judge, was with her when witness first met her.

Cross-Examined—Witness saw no one else in the house with Bob. Bob was wounded in the abdomen, apparently with a knife, by a slight gash.

Judge Holcombe, colored—Knows the prisoner and points him out. Was present at the killing. Dianer was his mother. On that night, he staid in his mother's house. The killing occurred about eleven or twelve o'clock at night. Was asleep when it commenced. The blood falling from his mother's throat awoke him. He jumped up, and his mother was turning round in the middle of the floor. She then ran out, and he followed. He heard no noise in the house, except that of the blood from his mother. Six other children were in the house, none of whom were awake when he awoke. On the night of the occasion, when he went to bed, he left Bob sitting up. His mother was asleep when he went to the house that night, and he awoke her to ask her for his clothes. He does not know whether she was asleep or not when he went to bed. Bob always kept a razor in his house. On the night of the killing, after the killing, he saw Bob's razor on the hearth, bloody. Bob kept his razor at the head of the bed, on a little shelf. He saw Bob's knife, bloody, under the bed. Bob and Dianer had quarreled before they parted, a week before that time. He had seen Bob strike her before they parted. Bob stayed with her part of the nights after they had parted. Bob stated that the cause of the separation was a letter which she received from the father of her youngest child. Not quite half an hour after he came out of the house, he returned with Ben, and saw Bob, lying, with his throat cut.

Cross-Examined—His mother and Bob had been parted about one week. Bob remained in the house after the separation. Bob was on the bed with his mother when he came home that night. Bob never carried his clothes away f---

his mother's house. His mother objected to Bob's staying in the house with her. Bob was badly cut when he went back into the house—was cut across the throat, and in two or three places on the body. The cause of the separation was a letter received by his mother from the father of her youngest child. His mother continued to cook and wash for Bob, Bob paying her for this service.

Re-Examined—When he opened the door that night, Bob slipped off of his mother's bed. After they parted, she would not allow Bob to sleep with her. Bob wanted to come back, and she objected. One night, about two hours before day, he heard Bob trying to go to bed to his mother. She objected, and Bob went out of the house. He closed the door that night when he came home. That night, when he was awakened by the noise of his mother's blood, he went to the door, and found it latched. No one could have opened it from the outside when it was latched. It was not latched when he came home, but he latched it after he came into the house. There was another door to the house, and this door was latched on the inside, and could not be opened from the outside. (The knife and razor shown to prisoner (?) and identified as Bob's property.) Bob whetted the razor on Sunday before the killing, and did not use it afterwards.

Cross-Examined—When witness came home that night, he brought a light with him, and looked around, after having latched the door his mother had left open for him, to see if the other door was latched, and found it was.

L. M. Felton—This killing occurred on his place. When he first got there, Mr. Wilkinson had a large light in front of the house where the killing occurred. The house was divided by a partition, and had a chimney in the middle. He saw deceased sitting on the steps of one room of the same building. She had fallen back on the steps, and was dead. He then went to the other room, and found a boy sitting at the door, guarding it, with a light in his hand. He entered the room, and found Bob lying on the floor, apparently dead. He examined his pulse, and found it strong.

Shortly afterwards, asked him the question: "Bob, did you kill Dianer?" Bob muttered out something which he did not understand. He repeated the question, and Bob nodded his head in the affirmative. After considerable effort, he made witness understand that she had stabbed him with a knife. After daylight, near sun-up, he went and had a second conversation with Bob. He, Bob, stated that he was sitting in a chair near the door. He got up and went to the bed, put his hand on Dianer's ankle, and moved it up towards her body. He, Bob, cried out, "You struck me;" and Bob then said he would cut her, and reached his hand to a little shelf at the head of the bed, and got his razor, and made a stroke at her, but missed her. She fell over a chair, and then he made a second stroke and cut her throat. The strokes were both made after she got out of the bed. He then said he cut his own throat. He explained, or caused witness to understand, that the cuts on his side were so deep that the air escaped from them.

Cross-Examined—Bob had three wounds, or four. They were on the body—appeared to be only excisions (?) made by a sharp or pointed instrument, skin deep. The wound on the throat was not very dangerous, but might have been, if neglected. For some time previous to the killing, the parties, Dianer and Bob, had lived very unhappily together, and Bob was jealous of his wife.

Re-Examined—Examined Bob's clothes. There was considerable blood on his pantaloons—looked as though they had been handled by bloody hands. The knife was found under the bed, and was bloody. There was no weapon in the hands or about the person of Dianer. The wound on her neck was a smooth cut, as if made with a sharp instrument. That on Bob's neck seemed to have been made with a dull weapon. The razor was found in the ashes in the fire place. The pantaloons were found about six steps from the house. There was blood in each of the pockets.

Crossed-Examined—Witness cannot state that the pantaloons were Bob's. They were about twenty feet from the

house. The confessions of Bob were made to witness voluntarily, without any threat or promise whatever.

R. F. Baldwin—The next morning after breakfast, he went to the place of the killing. He went into the house where Bob was, and Bob stated to him that he went to the bed where Dianer was, and put his hands on her, and she cut him, and he complained of her. He put his hands on her again, and she cut him again. He then said he would cut her, and reached forth his hand to get his razor, and she got out of the bed. He struck at her and missed her. She stumbled and he stumbled. He then made the second attempt to cut her, and succeeded. Bob said, the first lick he didn't get her, but the second lick he did get her.

Judge, recalled—He saw the pantaloons about ten steps from the house. They were Bob's.

The Court charged the jury, that it was not necessary to show that malice existed any length of time previous to the commission of the offence, but that there must be malice to constitute the offence, which might have arisen simultaneously with the offence. Also, that while the divorce granted by the Agent of the Freedmen's Bureau was not legal, and of no force, still, if the parties had separated by mutual consent, the prisoner had no right to approach the bed of deceased, or place his hands upon her person.

After a verdict of guilty, the prisoner moved for a new trial, on the grounds:

- 1, 2. Because the Court erred in charging as above.
3. Because the verdict was contrary to the charge.
4. Because the verdict was contrary to the evidence and to law.

The Court refused a new trial, and this is alleged as error.

COOK, for plaintiff in error.

BASS, Solicitor General, for the State.

WALKER, J.

[1.] Was the charge of the Court correct? The Judge instructed the jury "that it was not necessary to show that malice had existed any length of time previous to the commission of the offence, but *there must be malice* to constitute the offence, which might have arisen simultaneously with the offence." The charge amounts simply to this: that malice must exist *at the time of the killing*; that is, malice in the legal acceptance of that term; and it need not have existed any length of time previously. Was the killing done under a state of feeling, on the part of the slayer, which the law denominates malice? If so, the killing would be murder. Whether malice be express or implied, if the killing resulted from either, the crime is the same. Malice shall be implied, where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

[2.] It is insisted that it was shown here that the deceased assaulted the defendant, and that, therefore, the killing was voluntary manslaughter only, and not murder. Whether there was any assault made on defendant or not, was a question for the determination of the jury, and unless their finding be clearly wrong, we should not disturb it. *Revel vs. The State*, 26 Ga. R. 276. In this case, page 282, the Court says: "The jury are made the judges of the law as well as of the facts in criminal cases. Neither this nor any other Court should suffer a person to be deprived of his life, where his guilt is not fully established. Is this case so clear as to warrant, much more to demand, the interference of this Court? We think not. On the contrary, we must say the testimony authorizes the verdict. No justification is shown for the killing." And so we say in this case. But even if there had been an assault shown, was the assault such as to free the defendant from the crime of murder? *Roscoe's Cr. Ev.* 726, says: "Although, under circumstances, an assault by the deceased upon the prisoner may be sufficient to rebut the general presumption of malice arising from the killing, yet it must not be understood that every trivial provoca-

tion which, in point of law, amounts to an assault, or even a blow, will, as a matter of course, reduce the crime to manslaughter. For when the punishment inflicted for a slight transgression of any sort, is outrageous in its nature, either in the manner or continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a diabolical malignity than of human frailty, and is one of the symptoms of that which the law denominates malice, and the crime will amount to murder, notwithstanding such provocation. "Barbarity," says Lord Holt, (*Keat's Case Comb.* 408,) "will often make malice." 1 *East. P. C.* 234; 1 *Russ.* by *Grea.* 515 (1). If, without adequate provocation, a person strikes another with a deadly weapon, likely to produce death, although he had no previous malice against the party, yet he is to be presumed to have had such malice at the moment, from the circumstances, and he is guilty of murder.' 1 *Rus. on Cr.* 514.

It is insisted that the Court erred in the charge, that if the parties had separated by mutual consent, the prisoner had no right to approach the bed of the deceased, or place his hand upon her person. The ground of this objection is that it did not appear by the evidence that the parties had *agreed* to separate. The evidence does show they had for some time previous to the killing, lived very unhappily together, and had, in fact, separated. The jury could determine whether the separation was by mutual consent, better than we can, and we are not disposed to disturb their finding. It is not denied that the charge contains sound law; the only complaint is that there were no facts to justify it. We think the jury might very well find that the parties, by agreement, had separated.

[3.] Was the verdict contrary to the evidence and the law? There were two theories of the real facts of the case. The defence insisted that the account which Bob gave of the transaction, being introduced by the State, should control; that, according to that account, it was a case of manslaughter, and that the jury, in finding a verdict of mur-

der, committed such an error as to require the interference of this Court. On the other hand, the prosecution insists that while the defendant's sayings are evidence, they are not conclusive, and that other facts in the case show that his account of the transaction is not the true one, but was framed for the purpose of justifying his conduct. It is further insisted, that as the jury have passed on the merits of this question, there is no such error in their finding as to require this Court to set it aside. The theory of the prosecution is that defendant killed deceased in a fit of jealousy, for refusing to gratify his lusts, such refusal being caused, as he supposed, by her fondness for another—the father of her youngest child—and without any sort of justification; and then attempted to manufacture such a state of facts as would make it appear that she was the aggressor. In support of this theory, it is insisted that but two weapons, the *knife* and *razor* of defendant, were found, both bloody; and the pants of defendant looked as if they had been handled by bloody hands, and there was blood in each pocket of the pantaloons. From these facts the inference is drawn, that defendant, after cutting the throat of deceased, made the slight cuts, or “slight gash,” as Mack Felton calls it, on his body, which appeared to have been made with a *sharp* instrument, “skin deep;” and that he then, with his hands reeking with the life blood of deceased, took his knife out of his pantaloons pocket and with that cut his own throat, and threw the knife under the bed, for the purpose of making it appear that it had been used by deceased. The fact that the wound on defendant's neck seemed to have been made by a *dull* instrument, is relied on to show that the *knife* may have been used by defendant in cutting his own throat, for if the *razor* had been used, the cut would have appeared *smooth*. These facts and inferences are relied on to show that the jury were justified in disbelieving the account given by defendant, and in finding contrary thereto. The homicide was not denied, and the only testimony to reduce the grade below murder was the sayings of defendant,

and the jury thought these were not credible. It is insisted that defendant was *acting a part*, as shown by the fact that he appeared to be dead, although his pulse was strong—mumbled out something, although the wound on the neck was not very dangerous; and, besides this, it is insisted that the deceased was trying to get away from him when he cut her throat, even according to his own statements, and that his conduct showed a reckless brutality wholly without excuse. Judge LUMPKIN and I think this is precisely the sort of case which should be left to the decision of the jury. They are in a better position to judge of the real facts than we possibly can be; and as one theory of the facts, and one pretty well supported by the evidence, too, will uphold the finding, we do not think that this finding is so clearly wrong as to make it our duty to interfere. Indeed, we think the verdict is right; that the defendant, urged on by his lusts, was endeavoring to gratify his desires; that being denied this, and acting from feelings of jealousy, he took the life of this helpless woman as she was endeavoring to escape from him. He had struck her before they parted, which shows the brutality of his character; and now, after she had left her bed to get out of his way, he struck at her with his razor and missed her; she stumbled, and he struck at her again and cut her throat, inflicting a wound of which she died in a few minutes. Is this manslaughter? Must we say this conviction is so clearly wrong that we will set it aside? I do not think it is our duty to do so.

Judge HARRIS thinks the account given by the defendant of the transaction is the true one, and that the verdict should have been one for voluntary manslaughter, and for this reason, as I understand his position, cannot concur in the judgment which we render, affirming the judgment of the Court below.

Judgment affirmed.

HARRIS, J. dissented.

LEVI M. ADAMS, administrator of Joseph Allen, deceased, plaintiff in error, vs. WILLIAM E. BROOKS, and others, defendants in error.

[1] Letters of administration upon the estate of a man who died in Alabama, a resident of that State, and who left no effects in Georgia, cannot be granted by the Ordinary here. He has no jurisdiction.

[2] Bond for titles, with all the purchase money paid, is a complete title to land; and the vendor has no property in that land, remaining in him, whereon to grant administration after his death.

[3] The ruling in *Pitts vs. Bullard*, (8 *Kelly*, 5,) having been made by an able Bench, after full argument by able counsel, having since been followed and applied in divers cases, and having been left unmolested by the General Assembly, should not now be changed by the Court. The rule *stare decisis* should be maintained.

Motion to revoke Letters of Administration. Tried before Judge WARNER. In Meriwether Superior Court, on appeal from the Ordinary. August Term, 1866.

In 1837, Joseph Allen executed a bond to one Veal, conditioned to make to Veal warranty titles to a certain lot of land in Meriwether county, as soon as the grant issued from the State, and such titles were demanded.

In 1843, the grant issued to Allen, but so far as appears, no demand upon him for titles was ever made. The bond is still outstanding.

Allen died in Alabama, a resident of that State. Letters of administration upon his estate, were granted by the Ordinary of Meriwether county, to Adams, the plaintiff in error; and Adams, as such administrator, commenced his action of ejectment against one Jones, to recover the land specified in said bond, and conveyed to Allen by said grant.

Subsequently, Jones, together with some or all of the heirs at law of Allen, moved the Ordinary to set aside and revoke the letters of administration granted to Adams, on the ground that Allen died a citizen of Alabama, and left no estate in Georgia, and therefore, the Ordinary had no jurisdiction.

This motion was finally tried, on appeal, in the Superior Court, when Judge Warner charged the jury, that, to give jurisdiction in Meriwether county, Allen must either have

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died there, or left property or effects there which could be recovered and reduced to possession by his administrator as assets; that if Allen had, before his death, sold said land, executed a bond for titles, and received the purchase money in full, and had, when the letters of administration were granted, no other property in the county of Meriwether, then, the land was not the property of the intestate so as to give the Court of Ordinary jurisdiction to grant letters of administration on his estate, and that the administrator would not be entitled to recover the same, for the purpose of administering it.

This charge is excepted to by Adams as erroneous.

DOUGHERTY, for plaintiff in error.

PEAVY, for defendant.

HARRIS, J.

[1] The question made by this record is, whether the Ordinary of Meriwether county had any jurisdiction to appoint an administrator upon the estate of Joseph Allen, deceased, who died a citizen of Alabama, leaving no property in Meriwether county?

Allen had, many years ago, been a citizen of said county, and, previous to his removal, had sold his lot of land in Meriwether to Veal, and gave to him his bond to make titles upon the payment of the purchase money. During his life he received the full amount of the purchase money; he died leaving no property whatever in said county.

From the judgment of the Ordinary granting *administration to plaintiff in error, an appeal was taken to the Superior Court, and upon the trial there, the distinguished Judge presiding charged the jury, "That to give jurisdiction to the Ordinary in Meriwether county, Allen must have either died there or left property and effects there, which could be re-

* See the Reporter's statement for a correction of this inaccuracy.—R.R.P.

covered and reduced to possession by his administrator as assets."

This charge we deem entirely correct.

[2] The uniform decisions of this Court, from its organization to the present time, have been that a bond for titles, where the purchase money had been paid in full, without deed, or any formal conveyance, vested a perfect title.

If this be so, then, it cannot be maintained that the land in Meriwether remained as a part of the estate of Allen. It seems to us to be very clear that no administrator of his estate would, or should be permitted, in any Court where justice is administered, to recover that land and reduce it to possession as assets. The right to do this would be indisputable, if it be conceded that Allen has any *remaining property* in that land which can by a sale be converted into money.

A demand of administration in this case is equivalent to the assertion of the existence of property: we deny that the land is the property of Allen's estate. Allen's relation to the land, viewed after the most searching analysis, resolves itself into, simply, a trust for the purchaser—a mere power abiding in him to execute a formal conveyance of title—that *power is not property*—not an interest in the land—is incorporeal, intangible, and incapable of alienation.

[3] The distinguished counsel for plaintiff in error, does not regard the principle as sound, that a bond for titles, where the purchase money is fully paid, vests a perfect title, and by his brief, asks this Court to go back and review and reverse the case of *Pitts and Bullard*, and all the decisions since made in accordance with it.

I am not called on to express my individual opinion as to the *technical* correctness of that original decision, nor is there now any necessity. It is, perhaps, enough to say it was made by an able Bench, after full argument by able counsel. At intervals of time since it was made, five or six cases involving the same principles have been before this Court, constituted of different Judges from those who made the decis-

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ion in *Pitts and Bullard*, and by all, with entire unanimity, as the reports show, that decision has been followed and presumptively approved.

The Legislature has convened annually since that decision, containing at all times members of the bar in full practice and familiar with the printed decisions of the Court, and as their journals show, animated by a spirit of reform, they have been prompt to alter what, in our State Jurisprudence, they have deemed violative of right or principle, in their opinion, yet, we believe that no member has, so far, ever attempted to modify the doctrine as originally announced.

Though this application proceeds from a member of this bar of acknowledged ability, and for whose legal opinions we entertain high respect, we feel that the facts we have stated are so overwhelming in the conclusion to be drawn from them, that they effectually preclude our acceding to his request. *Stare decisis* is a rule to insure uniformity. This tribunal, when it ceases to regard it, will greatly impair its value, and fail to secure public confidence. If this Court has been wrong from the beginning, on this subject, let the legislative power be invoked to prescribe a new rule for the future; until altered by that power, we are disposed to adhere to the rule which has been so long applied by our Courts and is so well known to the legal profession.

Let the judgment below be affirmed.

ANDREW HOWELL, plaintiff in error, vs. A. SHANDS & Co.,
defendants in error.

[1.] When seven persons only are named on a judgment of record, and the exemplification offered in proof, shows that eight persons were included in the judgment, it is a fatal variance.

[2.] Where the record of a foreign suit shows that an execution issued and certain proceedings thereon were had, and the exemplification of the record does not set out a copy of such execution, the evidence is demurrable.

[3.] When an action of debt is brought on a joint judgment, and two of the parties only are served, the Sheriff returning *non est inventus* as to the rest of the defendants, it is error in the Court to allow the name of one of the defendants who was sued and served, to be stricken from the case, and it may be taken advantage of by plea of *non joinder*, filed instantly by the other defendant.

Debt on foreign judgment. In Lumpkin Superior Court. Tried before Judge IRWIN. February Term, 1866.

This action is described in 28 *Ga. R.* 222, the case of *Shands & Co. vs. Howell & Co.*, except that the name of Andrew J. Mullinax is not found in the declaration that now comes up in the record; the consequence of which is, that, according to said declaration, the firm of A. Howell & Co. consisted of seven persons only, and hence, the judgment rendered in California, is to this extent, different, as set out in the declaration, from the one introduced in evidence.

At the last trial of the cause in the Court below, the plaintiffs, before offering any evidence, moved to amend by striking from their declaration the name of Andrew J. Mullinax. Counsel for Howell objected. The Court overruled the objection, and allowed the amendment. This left the cause to proceed against Andrew Howell alone, six of the original defendants not having been served with process, but returned by the Sheriff *non est inventus*.

Counsel for the defendant now announced to the Court that they would amend their plea, but afterwards declined doing so.

Plaintiffs then offered in evidence the exemplification of a record from California, which is copied in 28 *Ga. R.* pp. 222-3-4, together with a statute of that State concerning forcible entries and unlawful detainers. Defendant's counsel objected to the latter as irrelevant; and to the former:

1st. As proving a joint debt of record against eight defendants, and not a several and separate liability against Andrew Howell.

2d. As not showing affirmatively that the Justice's Court

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(the same not being a Court of record and general jurisdiction) had jurisdiction of the persons of defendants or the subject matter of the suit, but, on the contrary, showing that said Court had exceeded its jurisdiction.

3d. As not showing from what Court the appeal was entered, or that the appeal dismissed was in the same case tried in the Justice's Court.

4th. As showing that a fi. fa. was issued, but not setting out the fi. fa. itself.

The Court overruled the objections and admitted the evidence.

The defendant then offered a sworn plea in abatement, alleging the non-joinder of proper and necessary parties to the present action. The plaintiffs objected, on the ground that the plea came too late; and also, on the ground that it was not sufficient in law, even if defendant had filed it in time. The Court sustained the objection and refused to allow the plea.

The plaintiffs' evidence being closed, the defendant moved the Court for a nonsuit, on the ground that the proof showed a joint liability against eight defendants, while the action was proceeding against one severally—Mullinax, at least, who was served, and who was stricken by amendment during the trial, being a necessary party. The Court refused the motion, holding that the liability was several as well as joint.

The defendant then introduced in evidence a Statute of California, regulating proceedings in the Courts of Justices of the Peace in civil cases; also the following release:

" A. Shands & Co. vs. Andrew Howell, Andrew J. Mullinax, et. al.	}	Debt on foreign judgment from State of California, now pending in Lumpkin Superior Court.
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Received of Andrew J. Mullinax, one of the defendants, two hundred and thirty dollars, by compromise, in full of his *pro rata* share of the above debt; and, hereby, in consideration of said sum, I do release and fully discharge said Mullinax from all present or future liability on account of

said debt. But this is not to release or discharge any, or either of the other defendants, from any legal liability whatever.

Auraria, Ga. Oct. 24th, 1860.

WIER BOYD, Plaintiff's Attorney."

He then introduced said Andrew J. Mullinax, whose testimony related mainly to what transpired in California in reference to service, appearance, and the employment of counsel, in the suit in that State.

The defendant requested the Court to charge the jury (1) that the plaintiffs could not recover against him alone, in this action, on the judgment from California; (2) that dismissing the action as to Mullinax, dismissed it as to Howell; and (3) that a release to one defendant releases all, and Howell is entitled to the full benefit of the release made by the plaintiffs' attorney to Mullinax, and the attorney could not repudiate said release on the ground that he had no authority from the plaintiffs to give it. The Court refused so to charge, but charged, in substance, to the contrary, except that, as to the release, any amount paid to the attorney would be a credit to the defendant.

After a verdict for the plaintiffs, the defendant moved for a new trial, on numerous grounds:

1. Because the amendment was allowed to plaintiffs' declaration striking therefrom Andrew J. Mullinax as a party defendant.

2. Because the defendant's plea in abatement was overruled.

3. Because the exemplification of the record from California was admitted in evidence.

4. Because a non-suit was not awarded.

5-6-7. Because the charges requested by defendant were refused, and the charges given in lieu thereof were erroneous.

8-9-10. Because the verdict was contrary to the charge of the Court, contrary to law, and contrary to evidence.

11. Because, by mistake of plaintiffs' counsel in hand:

the papers to the jury, the latter did not have out with them the original release introduced by defendant, but only a copy of it attached to the plea.

12. Because the verdict was for a gross sum, including both principal and interest.

The Court, after separating the principal and interest by a calculation, ascertaining the amount of each, and ordering judgment to be entered up for each, separately, overruled the motion and refused a new trial. This is complained of as error.

BELL, KNIGHT and LESTER, for plaintiff in error.

RICE, BOYD and BROWN, for defendants.

LUMPKIN, C. J.

We do not know whether much good will result from temporarily suspending this case. The defects complained of being more matters of form than substance; still, taking the direction that it has, devolving the liability originally incurred by eight persons on one only, he feels it, we suppose, a duty which he owes to himself to throw whatever obstacles he can in the way of a recovery.

[1.] The first objection that strikes us in the proceeding is this: This is an action of debt upon a California judgment against eight defendants, when, according to the declaration that now comes up as a part of the record in the case, the firm of A. Howell & Co., the original defendants, consisted of seven persons only. Hence, there is a variance between the judgment rendered in California from the one introduced in evidence. Indeed, the record of the case brought in Lumpkin county is contradictory of itself. It recites that Andrew Howell, Phillip Howell, Rufus Howell, Phillip Stonecipher, Joberry Mullinax, Thomas Thompson, and Thomas Phillips, of said county, recently a mining company in the county of Eldorado, State of California, then

and there mining and trading, and acting as joint and several co-partners, under the firm name and style of A. Howell & Co., owe to, and from your petitioners unjustly detained the sum, &c.

On the 13th day of October, 1856, Amarine Shands, one of the firm of Shands & Co., sued out bail process against Andrew Howell, one of the defendants in the action, in which it is alleged that the *seven* persons whose names are above enumerated, and Andrew Mullinax, whose name was not before mentioned—making eight, instead of seven partners, acting under the name and style of A. Howell & Co.,—are justly indebted to affiant on a foreign judgment from the State of California.

It is not to this latter variance, apparent on the face of the the declaration, that our objection is predicated. But the objection is, to offer a record from California, whereon a judgment is recovered against eight persons to support an averment that the judgment was against seven only, as was evidenced by this record. The allegation and the proof do not agree. Who compose the firm of A. Howell & Co., who are alleged to be indebted to the plaintiffs the amount recovered by the California judgment?

[2.] The record shows that there was an execution issued, upon which the property of the defendants—to-wit: their mining claims and fixtures—were sold under it, as is certified to by S. L. Crane, J. P., and yet there is no copy of said execution, with the proceedings had under it, set out in the exemplification. We think this was error. It is not competent for any body to state the contents of such a paper, when the paper itself is a matter of file or record. A certified copy is the highest and best evidence of its contents, as well as of the proceedings had under it, and we do not understand the decision in 28 *Georgia Rep.* 222, to cover this point.

[3.] We think that the Court erred in refusing the plea of non-joinder, after the name of Andrew Mullinax was stricken out of the case by the plaintiff, by the permission

of the Court; and upon this proposition we have felt no little difficulty. After listening patiently to the authorities read from *Gould's Pleading* and other elementary treatises, we feel quite sure that the able counsel for the defendants in error have failed to produce any direct authority which appears to be decisive upon this point.

Perhaps it would be as well to advert briefly to the law of contracts. Contracts are classified under three heads—1. Contracts of record. 2. Contracts of specialty. 3. Simple contracts. A debt of record is a sum of money which appears to be due by the evidence of a Court of record. Such a contract has these peculiar properties, or characteristics: It operates as an estoppel, and is conclusive between the parties. It effects, or works, a merger of the original cause of action. Thus: if a judgment be recovered for a debt due by bond, the debt thus becomes, by judicial proceeding, an act in law, transformed and metamorphosed into a matter of record, upon which latter security, whilst it remains in force and unreversed, the plaintiff's remedy, if any, must, in such manner as the law allows, be had.

The doctrine of merger is thus explained by the Court of Exchequer in *King vs. Hoare* 13, *M. & W.* 494, 504: "If there be a breach of contract, or *wrong done*, or any other cause of action by one against another, and judgment be recovered in a Court of record, the judgment is a bar to the original cause of action. Hence, the legal phrase, *transit in rem judicatum*, derives its force and aptitude. The cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher. This remark equally applies, whether the cause of action be against a single person or many. The doctrine of merger holds not only where the original action was founded upon contract, but where it was founded upon a tort for wrong, independent of contract. The judgment in this latter case, as well as in the former, when obtained, constituting a contract of record in which the right of action *ex delicto* is wholly merged. If, therefore, one hath judgment to recover

in trespass against *one*, although he be not satisfied, yet he shall not have a new action for this trespass. By the same reason, *econtra*, if one hath cause of action against *two*, and obtain judgment against one, he shall not have remedy against the other."

We will now apply these remarks to the case in hand. We concede, therefore, that for the trespass committed in California, the plaintiffs had their election to proceed against the defendants as trespassers, either jointly or severally. They did proceed against them jointly, and obtained a verdict and judgment against them jointly. They must, therefore, regulate all their subsequent proceedings accordingly.

They instituted suit in Lumpkin county, jointly against the defendants, and two of the defendants are served, Andrew Howell and Andrew Mullinax, and *non est inventus* returned by the Sheriff as to the other defendants; whereupon, upon the plaintiff's application, Mullinax is stricken from the writ, and the cause suffered to proceed alone against Howell, and the joint judgment rendered against eight persons in California, is offered in evidence to sustain the action against Howell alone.

To justify this proceeding counsel refer often, if they do not rely much upon the original cause of action. That the defendants were joint and several trespassers. I trust that the general observations made as to the doctrine of merger, entirely precludes any such reference. The original trespass is completely buried in the joint judgment, upon which this action is brought. It can only be treated as a joint liability, evidenced by the record from California.

But Section 3415 of the Code is relied upon to justify this amendment. It reads thus, "When two or more persons sue, or are sued in the same action, either on a contract or for a tort, the plaintiff may amend his declaration by striking out one or more of such defendants, and proceed against the remaining defendant or defendants if there is no other legal difficulty in the case."

Just so. But we apprehend the very difficulty which we

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are endeavoring to explain is in the way. A suit pending on a joint judgment against *two*, if you please, both residing in the county where the suit is pending, and both served by the Sheriff, one is arbitrarily dismissed from the action and it is proposed to proceed to judgment against the remaining defendant alone.

Is there any other case known in practice where this can be done, where the liability is joint? I do not affirm that there is not; what I do say is, that such a procedure cannot be helped, upon the idea of the original action being trespass, the parties were jointly and severally liable. It has passed beyond this and can only be known now and treated as a joint debt, evidenced by a record, against which nothing can be alleged, but that there is no such record.

This section of the Code, like many others, is intended to subserve the ends of justice. Plaintiffs and defendants may be changed for this purpose, but never to work a wrong or injury to parties.

Section 3908 of the Code provides that, "If judgment is entered jointly against several trespassers, and is paid off by one, the others shall be liable to him for contribution," and this is obviously right. Whether this provision is restricted to trespasses committed since the adoption of the Code, or to those also before, and the judgment has not been paid since, is not in the case. If the latter construction should be adopted, then the discharge of Mullinax might affect the continuing liability of Howell. At any rate, is it competent for the plaintiff to dismiss one of the joint judgment debtors at this stage of the proceeding. This is merely the suggestion of the Judge who writes out the opinion.

And whether the common law rule obtained in California when this judgment was recovered, or the law of this State as it is now declared in the Code, does not appear.

Considering that the plea in abatement tendered by the defendant ought to have been allowed to be filed, and that it was in time, the exigency having just occurred which made

such a plea applicable, we reverse the judgment of the Court below.

Judgment reversed.

SAMUEL CLARKE, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.

- [1.] Persons of color are competent witnesses in all cases, just as white persons are.
- [2.] When a homicide is proved, the law presumes malice, and unless the evidence should reverse the slayer, he should be found guilty of murder.
- [3.] The jury in criminal cases being made the judges of both law and facts, their finding will not be disturbed, unless it be clearly wrong.
- [4.] The law decides upon the competency of witnesses, and the jury upon their credibility.

Murder. In Spalding Superior Court. Tried before Judge Speer. July Special Term, 1866.

The plaintiff in error was tried for the murder of Daniel Kerbow.

When the colored witnesses were introduced by the State, the prisoner objected to their competency. The Court overruled the objection.

Evidence for the State.

Kitty Ann Neal, a person of color—The difficulty commenced about a bread tray. Deceased sent Indiana, his daughter, to get a bread tray, to Mary Clarke's, to make up bread for his dinner. Mr. Kerbow, the deceased, lived down by the new graveyard in Griffin. The difficulty occurred day before yesterday between 12 and 1 o'clock. Witness was present. Eliza and Mima Barnet were also present, and some small children. No white person present but defendant, his wife, and the deceased and Indiana. Indiana

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went into the house, and did not see the difficulty. The house has two rooms and three doors—two doors toward the kitchen; two doors in the kitchen—door to each room, fronting to the house. Road runs south of the house. Deceased was in the room of his own house farthest from the road. Indiana went to defendant's house, who, with his wife, lived in one end of the kitchen, for the tray. Mima lived in there with them. Deceased sent to Clarke and wife for the tray. I was in the adjoining room when she went after the tray—heard the conversation after she went there. Indiana asked for the bread tray. Defendant's wife said as long as he accused her of stealing the meat and meal, and salt, deceased should not have the tray to save his life—said she would see him in hell before he should have it. Deceased was standing on the steps of his house. Defendant was lying on the bed in the room where he lived—wife was in there also. Deceased said he thought it was mighty hard he had bought a tray, paid his money for it, and could not get it to make up bread for his dinner. Defendant's wife said she had bought the tray, and it was hers, and before he should have it, she would put it into ashes, a damned old rascal. Defendant's wife is deceased's daughter. Deceased said that he would have it—that he would be damned if he did not have it. She said he should not have it to save his infernal old life. Deceased said it was a lie—her buying the tray—that he bought it himself. He gave her the lie two or three times, when the defendant stepped up and said, "Look here, old man, you must not give my wife the lie, or curse her either; if you do, I will give you what you don't want, and that will last you your life time." Deceased said it is a lie—you take it up, sir; if you do, help yourself. Defendant said, "Yes, I do take it up, for Mary is my wife," and shot. The ball went through the door. Deceased then jumped down, picked up a brickbat and threw it at him, and hit the wall of the house. Defendant then shot at deceased, and hit him in the arm. Deceased fell—fell right at the steps, his head up against the steps of the house, and

hallooed, "Oh, Lordy! Kitty, help me!" Defendant then stepped up and shot him again, after he was down—shot him in the side—then went back into the house, got his coat, and put it on as he ran towards the old grave yard. Deceased still lay there hallooing. I helped him into the house and on to a bed, and gave him some water. This was between 12 and 1 o'clock in the day. He lived until a little after twelve the same night, when he died. His wife was not present. She was sent for, and came about 2 or 3 o'clock in the evening.

Cross-Examined—What defendant's wife said about deceased not having the tray was said to Indiana, the daughter of deceased. Deceased was sitting on the steps of his house. Indiana went back and told her father. Then deceased went to the other end of the kitchen where the negro women were staying and asked Eliza if that was not the tray he bought. She replied, there were two, and they were so much alike she could not tell. He said he intended to have it, and went on back and sat on the steps, and, while there, said he would have the tray if it cost him his life. Defendant shot him with a pistol. The ball that missed him, when defendant fired first, went into the door close to where deceased was standing. After defendant had shot three times, he presented his pistol as if going to shoot again. I begged him not to do so, and he then got his coat and went off.

Eliza Thomas, a person of color—I was lying on the bed sick in the room adjoining defendant's in the kitchen when the difficulty began. The first I saw, deceased came down his steps and said to defendant's wife, God damn her, he intended to have his tray—it was his. He then stooped down near the steps and asked defendant if he took it up. Defendant said yes, he would protect his wife anywhere. Deceased then said to him, help yourself if you can. Defendant then shot at deceased, and missed him. Deceased then stooped down, picked up a brick and threw at defendant, but never hit him. Defendant then shot at him and

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hit him in the shoulder, and deceased fell, and after he fell he shot him again and hit him in the side. From defendant's door to deceased's door is about twenty feet. After he was shot the second time, defendant put on his coat and ran, and deceased rose, went into his house, and fell on his bed. Before defendant fired the first time, and after he had pulled his pistol out, I heard deceased say, I am done with it. Deceased died between 1 and 2 that night. What I saw was seen through a crack. Saw deceased stoop down. Don't know what he picked up. Heard the brickbat strike the house. Heard deceased say to defendant, God damn her, he would have his bread tray in spite of hell, and then went to the well and got a bucket of water—carried the bucket in his room, came out, and commenced again, and defendant said, "Old man, let us talk in reason." Deceased asked him if he took it up. He said, yes, he would protect his wife anywhere. Deceased had stooped down before defendant ever fired.

Dr. Thomas M. Darnall—Am a physician. Was called professionally to aid in a *post mortem* examination of deceased at his house on yesterday, the 2d of August. His house is in Griffin, and in Spalding county. I went at the request of Dr. Knott. We made it. We opened first the abdomen, examined its contents, and then raised the breast bone, or chest. The shot that struck the shoulder entered the chest between the 3d and 4th ribs. Did not examine the lung critically. Found considerable blood in the cavity of the chest. Second wound was below—entered between the ribs and passed through his body and lodged against the ribs on the other side. Either of the wounds would, in my opinion, have proved mortal, and he died from the effects. The shot was in the left shoulder and on the left side.

Dr. Edward F. Knott—Am a practicing physician. Was called to see deceased about 2 o'clock day before yesterday. Found two wounds—one through the shoulder, the other between 7th and 8th ribs. Wounds were inflicted by leaden balls used in pistols (produced the balls.) Attended him in

his last hours. He died about 2 o'clock A. M. Visited him four times that afternoon and evening. He seemed to be conscious of his situation. He stated to me: "Dr., I shall die, and you know it; I am now on my death-bed; I shall speak the truth. My son-in-law, Clarke, shot me, and my wife was the cause of it, and it will be the cause of my death." This was at the last visit I made in the afternoon. Deceased died from the wounds. All of his organs were otherwise healthy. He died in this county.

John L. Doyal—Am deputy marshal of the city of Griffin. Had a warrant placed in my hands for the arrest of defendant. Executed the warrant. Arrested defendant about thirty miles from here, in Meriwether, about 4 o'clock yesterday, 2d day of August. Got a pistol from him—the one produced. Four barrels were empty—two loaded. It was a six shooter. When deceased was once confined in guard-house here, he accused Clarke and his family of having him put there, and said he intended to kill him if he ever got a chance. I told Clarke about it some weeks afterwards. This was in February or March of this year.

The Court charged the jury that when a homicide is proved, the presumption is that the killing is murder, and that it was for the evidence to show justification, or to reduce the offence to a lower grade.

After a verdict of guilty, the prisoner moved for a new trial, on several grounds:

1. For error in admitting the colored witnesses.
2. For error in the charge of the Court.
3. Because the verdict was contrary to law and evidence, the facts making a case of voluntary manslaughter only.
4. Because the verdict was contrary to the weight of evidence.

The Court refused to grant a new trial.

DOYAL and NUNNALLY, MARTIN and DISMUK, for plaintiff in error.

HAMMOND, Solicitor General, for the State.

WALKER, J.

[1.] We think the effect of the act of 17th March, 1866, *Pamp. Acts*, p. 239, entitled, "An Act to define the term 'persons of color, and to declare the rights of such persons,'" was to make persons of color competent witnesses in all cases, just as if they were white. In other words, that all distinction, on account of color, was done away with, so far as competency to testify is concerned; and, for myself, I will say, I think it conferred on them the full civil rights of a citizen, and made them, before the law, entitled to all the civil rights enjoyed by white persons. We do not feel disposed to fetter the enjoyment of those rights by technical criticism, but desire to carry out in good faith the legislative will.

[2.] The Court charged the jury, "that when a homicide is proved, the presumption is that the killing is murder, and that it was for the evidence to show justification, or to reduce the offence to a lower grade." In *Cohron vs. The State*, 20, *Ga. R.* 760, this Court says, "that the son was slain by the father was not denied. In contemplation of law, the homicide was murder; and it was for the slayer, by proof, to relieve himself from this presumption, to reduce the offence from murder to manslaughter." In *Choise vs. the State* 31, *Ga. R.* 464, the Court says: "The State having proved the homicide, closed, as the law would imply malice from the killing." "When a man commits an unlawful act, unaccompanied by circumstances justifying its commission, it is a presumption of law that he has acted advisedly, and with an intent to produce the consequences which have ensued. See *Dixon's case* 3, *M. & S.* 15. Thus a presumption of malice arises in many cases. 'In every charge of murder,' says Mr. Justice Foster, 'the fact of killing being first proved, all the circumstances of accident, necessity, or infirmity, are to be satisfactorily proved by the prisoner, un-

less they arise out of the evidence produced against him, for the law presumes the fact to be founded in malice, until the contrary appears.' *Foster* 255 ; 1 *Hale*, P. C. 455 ; 1 *East*, P. O. 840." *Ros. Cr. Ev.* 21. These authorities—and the number might be greatly increased—we think, fully sustain the charge of the Court as given in this case.

[3.] Should a new trial have been granted on the grounds that the verdict was contrary to law and evidence, and the weight of evidence? "The jury being made the judges both of the law and the facts in criminal cases, their verdict will not be disturbed, unless it be clear that the defendant has been wrongfully convicted." *Revel vs. The State*, 26, *Ga. R.* 276. It is insisted that the evidence shows a case of voluntary manslaughter, and not murder. Is it "*clear* that the defendant has been *wrongfully convicted*" of murder? Without critically analyzing the testimony, I deem it necessary to say only that it showed the existence of a very bad state of feeling between the parties; and a pretty clear inference is, that the deceased was, in his own family, *alone*, save the society of his little daughter, Indiana. The expression used by him to Dr. Knott, when all hope of life was gone, is full of meaning. The presence of the old man, for reasons not disclosed in this record, was not wanted in that family; and this was seized as the occasion to be forever rid of him. As to the provocation given defendant by the language of deceased to his daughter, the wife of defendant, it would seem that she was a match for her father in the use of "Billingsgate;" and this was, therefore, no such provocation as to justify or mitigate the conduct of defendant. There is no assault proved to have been made on defendant before he shot at deceased, for both witnesses say he picked up the brickbat *after* defendant had shot at him; and one of the witnesses says: "Before defendant fired the first time, and after he had pulled his pistol out, I heard deceased say, '*I am done with it.*'" There being no assault on defendant, nor attempt to commit a serious personal injury on him by deceased, nor other equivalent circumstances to jus-

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tify the excitement of passion and exclude all idea of deliberation or malice, we think that not only is it *not* "clear that the defendant has been wrongfully convicted," but that "all the circumstances of the killing show an abandoned and malignant heart."

[4.] As to its being a verdict founded on the testimony of "persons of color," all we have to say is, that the law makes them *competent* witnesses, and it was the right and duty of the jury to judge of their *credibility*. We are satisfied the jury did their duty in the premises; this was the opinion of the Court below also. But if the testimony of the colored persons were out of the case, would not the defendant be found guilty of murder? The killing was proved by the dying declarations of the deceased; the law implies malice, and that the testimony in the cause must show a grade of homicide below that of murder, otherwise the defendant must be convicted. The negro testimony aside, where is any testimony to show any sort of mitigation whatever? We see none, and are inclined to hold that the verdict should have been the same upon the testimony of the white witnesses alone. We think the Court did right to refuse a new trial.

Judgment affirmed.

THE MANUFACTURERS' BANK OF MACON, plaintiff in error, vs.
ARTEMUS GOOLBY, defendant in error.

When several cases for one hundred dollars each, were brought at the same time, upon similar causes of action, by the same plaintiff against the same defendant, all of them returnable to the same monthly Term of the County Court:—Held that said Court had jurisdiction of the cases as brought, and that although the defence to each and all of them might be the same, an order of consolidation, whereby the jurisdiction would have been ousted, was properly refused.

Certiorari. Decided by Judge COLB. At Chambers.
December, 1866.

This was an agreed case, brought before Judge COLB that he might review a decision made by the County Court of Bibb.

Goolsby brought against the Manufacturers' Bank of Macon, upon its bills or notes, forty-four suits, each for one hundred dollars, all of them commenced and served at the same time, and all returnable to the August monthly Term of the County Court. Seven of them were founded upon issues of the Bank prior to 1861; and the remaining thirty-seven, upon issues dated in 1862.

At the appearance Term, counsel for the Bank, after showing to the satisfaction of the Court that the defence to all the suits of the first class was the same, and to all those of the second class was likewise the same, moved to consolidate all the suits of each class into one, thus making but two suits of the whole; and that these two be then dismissed on the ground that the Court had no jurisdiction to try them.

The Court overruled the motion, and adjudged that the plaintiff might proceed in said Monthly Court with each of the original suits, and that the Court had jurisdiction to entertain and try the same.

Judge COLB affirmed this ruling, and his decision is now complained of as erroneous.

LANIER & ANDERSON, for plaintiff in error.

RUTHERFORD & WEEMS, for defendant.

HARRIS, J.

Of the oppression, from the heavy costs which the plaintiff in error will necessarily sustain, by reason of the defendant in error having sued in the County Court, his claims broken up into amounts so as to be covered by the jurisdic-

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tion of that Court, we are fully sensible. Had there been but one case, and brought to the Superior Court, the cost would not have exceeded fifteen dollars; or if two, thirty dollars. As it is, there are *forty-four* suits; and the probable costs will be over six hundred dollars. It is not right that such a state of things should exist; it will again and again occur in suits on Bank notes, unless corrected by definite and just legislation.

We have no power to alter the law, or, by any decision made in accordance with law, to relieve the plaintiff in error from the costs which they will incur, by ordering a consolidation of these forty-four suits. An order for consolidation would operate an ouster of the jurisdiction of the County Court;—that jurisdiction was conferred by law, and can be taken away only by law.

Judgment affirmed.

JAMES JACKSON, plaintiff in error, vs. JOEL DEESE, JAMES BLOODWORTH, and EPSEY MURKINSON, administratrix of BENJAMIN MURKINSON, deceased, defendants in error.

- [1] It is error to refuse an application for a writ of partition to divide mills which were partnership property, upon the ground that the time had not elapsed fixed for the dissolution by the articles. There being many causes for which a dissolution will be decreed before the expiration of said time.
- [2] Under the Code, and particularly Sections 3015 and 3906 thereof, it is not proper to force a party to go into Equity, to obtain a decree for the dissolution of co-partnership in milling property, before applying for a writ of partition to divide such property.
- [3] In all extraordinary cases the common law Court may so frame its proceedings and order as to meet the exigency of the case, and the verdict and judgment may be so moulded as to mete out justice to all parties as by decrees rendered in equitable proceedings.

Application for Writ of Partition. In Wilkinson Superior Court. Decided by Judge A. REESE. October Term, 1866.

Jackson, the plaintiff in error, after giving the requisite notice under the Code, presented to the Superior Court of Wilkinson county, his petition praying for the appointment of commissioners to partition among himself and the defendants in error, (he claiming one-fourth,) certain premises known as the Deese & Jackson mill tract, being a mill seat, and such lands (one hundred acres more or less) as are necessary for yard, pond, dams, etc., and having thereon a grist and saw mill, with machinery and other appurtenances.

Two of the defendants in error, towit, Deese and Bloodworth showed cause against said application, by their answer on oath, referring therein to a contract of partnership, of which the following is a copy:

"GEORGIA,
Wilkinson County. }

This agreement made and entered into this the sixth day of August, 1864, between James Jackson, Joel Deese, James Bloodworth and B. F. Murkinson, all of said county and State, witnesseth:

1st. That the parties all agree to erect a grist mill at the mill seat known as the Deese & Jackson mill, near Toombsboro' C. R. Road, and such other improvements and buildings as the majority of the parties may be able and find necessary to do from time to time.

2d. That the parties do agree each to furnish an equal portion of the labor, cause the same to be done in and about the mill, and the repairing of the same in proper repair; provided, always, that the said Bloodworth and Murkinson shall do or cause to be done all the mechanical labor during the partnership.

3d. That the material used in and about the mill, or any addition or improvements thereto added, shall be furnished equally, share and share alike, by the parties.

4th. That the parties shall furnish and feed their own laborers at their own expense, but Bloodworth and Murkinson shall keep a correct account of all the labor done, and by

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which partner, and notify a partner when in arrears of labor or material.

5th. That Bloodworth and Murkinson shall have exclusive control and management of the mill, and shall be the judges of any and all repairs and improvements, and the plans of said repairs and improvements.

6th. That each partner shall be entitled to one-fourth part of the grain, and one-fourth of the profits of any improvements that may be added or made.

7th. Bloodworth and Murkinson shall employ the miller upon such terms as they see fit, at the expense of the partners; provided the miller shall sleep not more than one hundred yards from the mill, and shall do his eating not more than one hundred yards, they using all due diligence for the best interest of the concern.

8th. That Bloodworth and Murkinson shall keep correct books, which shall be open to inspection to any and all the partners, at any time, and shall have the books up for settlement the first of every December after this date, at which time, or as soon thereafter as possible, a general settlement shall be had and accounts balanced.

9th. That when a partner shall die, if such event should happen before a final dissolution of the partnership, his share in the concern shall be sold at public outcry to the highest bidder, by the executor or administrator.

10th. That in the event Murkinson or Bloodworth shall die, and their interest be sold, then the partners shall all come together, and of their number nominate one who shall have control with the survivor, Murkinson or Bloodworth, as the deceased partner had.

11th. The partnership shall last for five years, unless by consent of all the partners, given in writing, it shall be dissolved sooner.

(Signed by all the parties under their seals and attested by two witnesses.)

The answer alleged that under this contract the partners all went to work, but before the heavy timbers were

all procured and hauled to the mill-seat, Murkinson died, leaving no help in his place; that the other three continued the work until they raised the water frame, when Sherman's army came and destroyed everything upon the place as near as possible, cutting down what of the frame they failed to burn, and destroying every house, shop and bridge—this was on the 25th and 26th of November, 1864. That since that time, the respondents, (Jackson, though often requested so to do, not aiding them in any way or advancing any means for the purpose,) have replaced one grist mill and built a new saw mill out and out, not using twenty dollars worth of the machinery which formerly belonged to said mills; built a considerable forebay (with a view to having a machine shop) costing nearly as much as the saw mill frame; built a new bridge and repaired another; repaired the dam; built a blacksmith shop for the use of the firm; all costing fifteen hundred or two thousand dollars, and leaving the respondents without any means whatever, and wholly dependent upon the mills. That the respondents have not only thus expended all their available means, but are largely indebted for hired labor and for materials. That the mills, ordinary as the grist mill is, it being a mere *gritter*, the parties not being able to procure large or good rocks, etc., are the only means by which the respondents are able to procure bread, the crops having proved a failure. That the saw mill is the only means to raise money to pay off the hirelings that helped to build it, or to keep up the dam, waste ways, etc., which are still needing repairs. That respondents are not able to put said property upon the market on time, but Jackson is; and that to offer it for cash in the present condition of the country, when but few have the means to purchase, would leave their interest unprotected.

After Jackson had filed a replication (so it is termed on its face) to this answer, Bloodworth put in, on his own oath, another answer, calling it a rejoinder, in which he alleged that the foundation work of the mill, to-wit, the dam, the underwork of the frame, waste ways, etc., there at the time

of forming the partnership, and of great value, greater than that of the houses, are there still, never having been destroyed. That the destruction alluded to in the former answer, was of braces and sills above the foundation, and of machinery appended to the building, not the original property itself; and that if there was more machinery than alluded to, it was damaged so as to render it unfit for use.

The reception of this second answer is one of the errors assigned.

A jury having been waived by the parties, the Court disposed of the case by the following order:

"It appearing to the Court that the property for partition is the subject of a partnership which has not yet been dissolved nor expired. It is therefore ordered that said application be refused, and that defendants do recover costs, etc."

This order is excepted to as erroneous.

WINGFIELD and CUMMING, for plaintiff in error.

RIVERS, for defendants.

LUMPKIN, C. J.

The Court seems to have put its judgment refusing this application, upon the ground, "That the property for partition is the subject of a partnership, which had not yet been dissolved nor expired;" and this would have been sufficient, under the law as it stood before the adoption of the Code. The parties would have been compelled, first, to go into Equity, and obtain a decree for a dissolution of the partnership, and then apply for a partition of the mill property. But it is not so now, and it will require time for the profession to wake up so as to comprehend properly the full meaning of the Code, its length and breadth, height and depth. For this purpose let us cite some of its sections.

Section 3014 provides, "That Equity jurisdiction is established and allowed, for the protection and relief of parties, where, from any peculiar circumstances, the operation

of the general rules of law would be deficient in protecting from anticipated wrong, or relieving for injuries done."

Section 3015: "No suitor, however, is compelled to appear on the equity side of the Court, but he may institute his proceeding for an equitable cause of action upon the common law side of the Court at his option, and the Court may allow the jury to find a verdict, and a judgment be rendered thereon, so moulded and framed to give equitable relief in the case, as verdicts and decrees are rendered and framed in equity proceedings."

It was said that every line in the Statute of Frauds was worth a subsidy. This section alone is far more deserving that enlogy, and it cannot be retorted to the latter, as it was of the former, that every line in it had cost the English people a subsidy in its construction.

Yet this great section was defeated for more than twenty years after its first introduction, the last time before its adoption in the Code, by a prominent Senator in the Legislature, now no more.

Section 3903, provides, that "whenever application is made for partition of lands and tenements, as hereinbefore provided for, and either of the parties in interest shall make it satisfactorily appear to the Court that a fair and equitable division of the lands and tenements cannot be made by means of metes and bounds, by reason of improvements made thereon, or by reason of the premises being valuable for mining purposes, or for the erection of mills or other machinery, or that the value of the entire lands and tenements will be depreciated by the partition applied for, then and in that case the Court shall order a sale of such lands and tenements, and shall appoint three discreet persons to conduct such sale, under such regulations, and upon such just and equitable terms as said Court may prescribe; which sale shall take place on the first Tuesday in the month, at the Court House of the county in which the land is situated, after an advertisement of such sale in some public gazette of this State for at least thirty days."

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But Section 3906 is a *Carte Blanche* to the Courts upon this subject. It applies precisely to the case before us. It enacts that: "In any extraordinary case, not covered by the foregoing provisions, (in relation to partitions) the Court may frame its proceeding and order so as to meet the exigency of the case, without forcing the parties into a Court of equity, and the Court may deny a sale or partition altogether, if it is manifest that the interest of each party will not be fully protected."

There is, therefore, no want of jurisdiction in the common law Court, to adjudicate this controversy. Is the Judge right in holding, that the time not having expired limited by the terms of partnership, that the property is not subject to partition?

Notwithstanding the time has not elapsed limited by the articles of partnership, still there are many causes which may arise that will justify a dissolution. These are mentioned in all the books on the law of partnerships. I will not enumerate them. From the facts contained in the mutual altercations between these parties, the partnership is already dissolved, and the only question really is, how to make a proper disposition and division of the partnership effects between the several owners. Common reason teaches any man that the objects of this association have become impracticable, and that its further continuance can be productive of nothing else than serious loss and injury to some of the parties. By the destruction of the mill property by fire, caused by the Federal army, the want of means, from the emancipation of slave property, the taking and carrying away of the teams, &c., the men of means in the concern have been so impoverished and crippled that what remains of their property is hardly sufficient for sustenance, and cannot be rendered profitable if directed to this enterprise. Jackson, who was looked to mainly to supply capital, or its equivalent in labor, when this partnership was entered into, by misfortune, without fault on his part, has become unable to carry on the business without loss, instead of the profits

he hoped to realize from the partnership. War is assigned as one of the causes for dissolving a partnership. Not considering it applicable in the sense in which it is used by the writers, may it not be true, in a less technical sense, to this and many other cases scattered all over the land? The destruction of the property which is the subject matter of the copartnership, is another cause which will work a dissolution *per se*. The foregoing remark as to war may be applied to this ground.

But I will not extend these remarks. We are quite clear that if the partnership be not already dissolved, it should be declared so by the judgment of the Court.

What, then, is to be done with the partnership effects under this application, bearing in mind that the party shall not be forced into equity, but the Court is so to frame its proceedings and order as to meet the exigency of the case?

Let the case be reinstated, and the Judge appoint commissioners to partition by sale the whole property belonging to the partners; that they be authorized to hear testimony as to the state of the accounts between the partners as to the property, and report back in writing to the Superior Court of Wilkinson county, together with a statement of the debts and liabilities of the copartnership, the said report, or any part of it, to be allowed or disallowed by the Court. That the Judge cause a special jury to be empaneled for this purpose who shall, by their verdict, assign to each partner such share of the money brought into Court from such sale as he is equitably entitled to, and find that said partnership as to the mill property shall be thence entirely dissolved, and that the Judge shall, upon such finding, so mould the judgment in the case as to cover all matters of controversy which were involved in said partnership.

If, in carrying out these instructions, difficulties may occur not anticipated by the Court, the Judge may, in his own discretion, enlarge his orders so as to meet and obviate them.

Clark vs. Green.

With these directions, we reverse the judgment of the Court below.

Judgment reversed.

JOHN W. CLARK, plaintiff in error, vs. BENEDICT H. GREEN,
defendant in error.

A contract for use and occupation will be enforced upon proof of title in the plaintiff and occupation by defendant.

Complaint. In Jones Superior Court. Tried before Judge A. REESE. October Term, 1866.

This action was by the defendant in error against the plaintiff in error, for the rent of 440 acres of land, known as the "Mills place," for the years 1856, 1857 and 1858, at \$200.00 per annum.

The plaintiff below introduced in evidence a deed made to himself by the Sheriff of Jones county, for 440 acres of land, situate in said county, sold as the property of John W. Clark, to satisfy a fi. fa. against him in favor of Green A. Clower; and proved by the Deputy Sheriff that he, the Deputy, made said sale.

He introduced *James S. Renfro*, who testified that he heard the plaintiff say that Clark was to redeem the land which he bid off for Clark. Clark remained in possession of the land and occupied it about two years, as well as witness could recollect. He left it in December, 1858. He might have occupied it longer than two years. Witness did not remember distinctly the length of time. The rent was worth from \$75.00 to \$100.00, per annum. It was said to contain 440 acres, but witness thought there were about 400 — much of it poor and worn out.

It was admitted that *N. S. Glover* would prove, if present, that the rent was worth not exceeding \$100.00 per annum.

The Court, after charging the jury that the relation of landlord and tenant is necessary to sustain the action for use and occupation, that an entry under agreement or contract for purchase is inconsistent with this relation, and that if the defendant held the premises under a contract of sale, the plaintiff was not entitled to recover, charged further as set out in the motion for a new trial.

The jury found in favor of the plaintiff \$225.00, with cost of suit.

Whereupon the defendant moved for a new trial:

1. Because the Court erred in charging the jury, "That if they should believe from the evidence that Clark went into the possession of the land as Green's land, and not as his own under a contract of purchase, then, the relation of landlord and tenant exists, and he is liable for what you may believe the use and occupation of the land to have been worth; and in arriving at a conclusion on this subject, you may look at the voluntary abandonment of the premises after the lapse of two or three years, by Clark, as going to show the intention and understanding between the parties," there being no evidence to call for or warrant said charge.

2. (According to the Bill of Exceptions, but this ground is not in the motion itself as sent up in the record.) Because the verdict was contrary to law and contrary to evidence.

3. For misconduct in one of the jurors. (*Abandoned in the Supreme Court.*)

The Court refused a new trial, and error is assigned.

CABINETS & PEEPLES, for plaintiff in error.

HARDEMAN and POE, for defendant.

WALKER, J.

Proof that the title to land is in the plaintiff, and

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that defendant occupied it under a contract, express or implied, is sufficient to sustain a verdict for use and occupation. *Mercer vs. Mercer*, 12 *Ga. R.* 421. This rule is admitted by counsel for defendant, (plaintiff in error,) but he endeavors to take his case out of the rule, by showing a purchase of the land from plaintiff by defendant; and thus make the principle of the case of *Barnes vs. Shinholster*, 14 *Ga. R.* 131, apply to this case. He relies on the testimony of James S. Renfroe to sustain his position. The title of the plaintiff, and the occupation by defendant, are clearly proved. Renfroe then swears "that he heard Green, the plaintiff, say that Clark was to redeem the land which he bid off for Clark." Does this prove a contract of bargain and sale? We think not. Did *Clark* ever agree to redeem the land; did he ever pay, or promise to pay, or offer to pay? The evidence does not show that he did. It would seem, from what the plaintiff said, that he intended for defendant to have an opportunity to re-purchase the land, or "to redeem it," in the language of the witness; but there is no evidence that defendant ever promised to do so, and for aught that appears in the record, he did not wish to do so. Never having paid, or promised to pay, anything for the land, is it right that he should occupy it for nothing? We think that, having used the plaintiff's land, it is but right that he should pay for such use. The jury assessed the amount, and, with the Court below, we are satisfied with their finding.

Judgment affirmed.

JOHN A. MCINTOSH, Administrator of WADE HAMBLETON, deceased, plaintiff in error, vs. DANIEL HAMBLETON, and others, defendants in error.

- [1.] Remaindermen under a will do not release their estate, or enlarge that of the tenant for life, by consenting, in writing, under seal, that the latter may receive the property without restrictions by the executor, and without giving bond to the remaindermen.
- [2.] Though an administrator is not liable for property lost or destroyed without fault on his part, he is bound to administer the estate according to law, by paying the debts before making distribution to legatees or heirs. This duty is enjoined upon him by law, by his oath of office, and by a sound public policy.
- [3.] An administrator who, with notice of an outstanding debt, paid to the heir before the expiration of twelve months from the grant of administration, a portion of the estate, retaining, in slaves and other property, enough to meet said debt, is not protected against the creditor's claim, by the results of the late war in the way of the abolition of slavery and the serious depreciation of the other assets retained. The administrator, in such case, must make good the deficiency caused by his own illegal act.

In Equity. In Thomas Superior Court. Decree by Judge HANSELL. At Chambers. October, 1866.

This was a bill filed in 1859, by the defendants in error against the plaintiff in error. The parties, finally, in 1866, agreed upon the facts, and referred the cause, for a decree, to the Chancellor in vacation, with liberty to except to his decision.

John Hambleton, Senior, after making his will, (since admitted to probate) died in 1854, leaving nine children and his wife, Margaret, surviving him. Eight of the children, with the husbands of such as are femes covert, are the complainants in the present bill; and the ninth, Wade Hambleton, now deceased, is the intestate of the defendant in the bill.

The testator bequeathed to his wife, Margaret, certain property for life, with remainder to his children. He also made his children the residuary legatees of his estate, and directed, both as to the remainder and the residuary interest, as follows: "That the male portion of my children who have not children themselves, shall own only a life estate, and if they die without, then, their share to go to the rest of my children."

The sons of the testator who had no children were two, to-wit: James, one of the complainants, and Wade, the intestate of the defendant. Two other sons of the testator,

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to-wit: Daniel and John, also complainants in the bill, were his nominated executors, and qualified as such.

On the 7th of March, 1855, the following instrument, attested by two witnesses, was executed under seal. It was signed by Wade, for himself, and as guardian of one of the complainants, by the husbands of two of the complainants, (daughters of the testator,) and by four of the complainants, (sons of the testator,) to-wit: Daniel, John, James, and George.

"State of Georgia, }
County of Thomas. }

Whereas, John Hambleton, late of said county, deceased, by his last will and testament, gave to his widow and relict, Margaret Hambleton, a large portion of his estate, real and personal, for life only, and another portion to Wade Hambleton for life only, and the absolute fee to pass upon the happening of a certain contingency, with another portion to James Hambleton in the way and manner as to Wade, and which will more fully appear by reference to said will, now of file and record in the Probate or Ordinary's office of said county. And, whereas, it is the will and desire of all the legatees under said will, that the said Margaret, Wade, and James, should receive the property, real and personal, without any restrictions from or by the executors, and without any bond to the remaindermen: Now, this writing witnesseth, that the undersigned legatees under said will, and remaindermen of the aforesaid property, do consent and agree, and fully authorize and empower, the executors of the last will and testament of John Hambleton, deceased—Daniel Hambleton and John Hambleton—to turn over to the said Margaret, Wade, and James Hambleton, all and every of the property, both real and personal, to each, every, and all of the aforesaid parties, to each the share given under the will—the consideration for the execution of this paper being the natural love and affection which the remaindermen have and bear towards the said Margaret, James and Wade Hambleton.

In witness whereof the said parties, remaindermen, have hereunto set their hands and affixed their seals, this the 7th day of March, A. D. 1855."

On the next day, an instrument somewhat similar to the above, was executed, by the two husbands who signed the foregoing; this second instrument being made and signed by them as trustees for their wives and for the children of their wives.

Under these instruments, the executors made divers payments to Wade Hambleton, taking his receipts therefor, until the aggregate sum in his hands, amounted to \$4,218.06, a part of which was derived from the general estate of the testator, and a part from the remainder in the property bequeathed to the widow for life, she having, in the meantime, died.

About the 13th of August, 1858, Wade Hambleton, himself, died, childless, leaving a widow his sole heir at law.

McIntosh, the defendant in the bill, soon afterwards administered upon his estate. In a few days after twelve months had expired from the grant of administration (notice of the claim having been given to the administrator within the twelve months) this bill was filed, to compel the administrator to account for, and pay over to the complainants, as remaindermen, out of the estate of his intestate, the sums which his said intestate had received from the executors of John Hambleton, senior, deceased; the bill alleging that the said intestate took but the use thereof for his life, under the will of his father, and that the corpus, by the terms of the will, belongs, in remainder, to the other children of the testator, to wit, the complainants.

The administrator answered the bill, and also filed several pleas. He pleaded the instruments of the 7th and 8th of March, 1855, as a relinquishment by the complainants of all their rights in remainder. He added to this the pleas of *plene administravit* and *plene administravit praeter*.

From his returns to the Court of Ordinary and the facts as conceded, it appeared that he had in hand \$3,100, in

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money, which he paid to the widow as part of her distributive share in the estate, prior to the expiration of twelve months after the grant of administration; that he retained in his hands two slaves, valued at \$1.700, and some promissory notes, nearly sufficient in value for the payment of the complainants' claim; that there is a lot of land, unadministered, which would make up any deficiency likely at that time to occur; that the slaves have been emancipated without fault on his part; and that some of the notes have become insolvent, and the land so much depreciated in value, that, if required now to meet this claim, he must do so from his individual means.

The Chancellor decreed in favor of the complainants for the whole amount, (\$4.218.06,) received by Wade Hambleton, the intestate, from the executors of his father, with interest thereon from the expiration of twelve months after the grant of administration; and that the same, in the event of a deficiency of assets belonging to the intestate in the hands of the administrator, should, to the extent of \$3.100, the amount distributed by the administrator to the widow, with interest thereon from the time of distribution, be collected out of the proper goods, etc., of the administrator himself.

Upon this decree error was assigned by the administrator; and the points urged by his counsel, in the Supreme Court, were:

1st. That the effect of the instruments of the 7th and 8th of March, 1855, was to vest in his intestate an absolute estate, free from the claim of the remaindermen.

2d. That having retained property sufficient to pay off this claim, which was destroyed by the late war, he should not be required to bring back, or make good the amount distributed to the widow.

SEWARD & WRIGHT, for plaintiff in error

McINTYRE, for defendants.

HARRIS, J.

[1.] It has been earnestly argued that the agreement made by the remaindermen under the will of Hambleton, that the tenant for life might receive and use the property without any restrictions by the executor, and without giving bond for its forthcoming and delivery upon the termination of the life estate, was an assignment of title by remaindermen to such life tenant.

We do not so regard this covenant.

The tenant for life acquired by it no greater or other estate than that given by the will.

[2.] Whilst we recognize as sound law the principle, that an administrator is not liable to account for property of an estate lost or destroyed without any fault on his part, he must see to it that he administers the estate according to law, by paying, after the expenses of the administration, the debts due by the estate, before he turns over to the legatees, or heirs, their shares of property. Payment to heirs without having paid the debts, is illegal, contrary to the oath of office of administrator, and is very frequently the cause of trouble, expense and tedious litigation, all of which can easily be avoided by simply obeying the law.

[3.] The administrator with the will annexed,* it appears, within the twelve months after his qualification as administrator, paid to the sole heir at law a portion of the estate, retaining, as he supposed, in his possession sufficient negro and other property to pay the debt or claim in this case, of which he had due notice.

And now he seeks to escape liability to pay said claim, by a plea of *plene administravit*, wherein he alleges the negro property had become valueless by the result of the recent civil war.

His liability to pay out of his own estate is the penalty for not conforming to law. Had he paid the creditor of the estate, the loss by the valuelessness of negro property would

* The Reporter found in the record no mention of a will by Wade Hambleton.—REP.

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have fallen on the heir. Having paid the heir what she was not entitled then to receive, the administrator's redress, if he has any, must be by suit to compel her to refund. If compelled to refund the amount paid irregularly, in this way only the administrator and his securities may be saved harmless.

Let the judgment below be affirmed.



JOSEPH GLENN, plaintiff in error, vs. THE STATE OF GEORGIA,
defendant in error.

A case having been fairly submitted to a jury, and no error of law having been committed by the Court, and there being evidence sufficient to support the verdict, the Court is unwilling to trench upon the functions of the jury by sending the case back for a re-hearing.

Certiorari. In Whitfield Superior Court. Decided by Judge MILNER. October Term, 1866.

The plaintiff in error was tried in the County Court on an indictment charging him with the offence of forcible entry and detainer.

Evidence was introduced; and the Court charged the jury as follows: "You have heard the evidence in the case; you have heard the law extensively commented upon by counsel both for the State and the defendant. You are the judges of the law and evidence in this case, and you will determine it for yourselves. If you are satisfied from the evidence before you, beyond a reasonable doubt, that the matters charged against him in the bill are true, it will be your duty to find him guilty. If you are not satisfied, beyond a reasonable doubt, that they are true, then it will be your duty to find the defendant not guilty." The Court then read *Sections 4410 and 4411 of the Code*, defining the offence, and

continued : " If you are satisfied from the evidence that the defendant entered into the premises violently, with menaces, force and arms, and without authority of law, it will be your duty to find him guilty, although he may not be forcibly detaining the premises; and if you are satisfied from the evidence that he is forcibly detaining the possession of the premises with menaces, force and arms, and without authority of law, although you may not be able to find he forcibly entered the premises, it will be your duty to find him guilty."

The jury found him guilty, and the Court imposed a fine of twenty-five dollars.

Thereupon the defendant sued out a certiorari, alleging that the verdict was contrary to law, to evidence, and to the charge of the Court, and that the charge itself was contrary to law.

At the hearing of the Certiorari the Superior Court affirmed the proceedings below, and refused a new trial.

This judgment is now complained of.

JOHNSON and GLENN, for plaintiff in error.

PARROTT, Solicitor General, for the State.

LUMPKIN, C. J.

We have examined the record in this case, and finding no error of law, and the same being fully and fairly submitted to the jury, and they having returned a verdict of guilty, we see no occasion to reverse the finding and send the case back to be reheard.

The jury must be allowed to exercise their legitimate functions; that is, to pass upon the facts in all such cases; and we are unwilling to substitute ourselves in their place.

Judgment affirmed.

Stancil vs. Kenan, et. al.

GEORGE W. STANCIL, plaintiff in error, vs. URIAH T. KENAN,
and others, defendants in error.

[1.] In an issue of *devisee vel non*, the propounder of the will is plaintiff.

[2.] If one of several caveators die pending the proceeding to probate a will, the propounder may proceed and try the case without making the representative of the deceased a party.

Caveat. In Whitfield Superior Court. Decision by
Judge MILNER. October Term, 1866.

Michael J. Kenan, Uriah T. Kenan, and several others, heirs at law of Owen H. Kenan, deceased, entered their caveat to the paper propounded as his last will and testament. The Ordinary decided against the will, and the executor appealed to the Superior Court. Michael J. Kenan, one of the caveators, died, and his death was suggested upon the record. Twelve months afterwards the cause came on for trial, when the surviving caveators, by their counsel, objected to proceeding with the trial, because the legal representatives of Michael J. Kenan had not been made a party. The Court sustained the objection, and this is alleged as error.

KENAN and AKIN, for plaintiff in error.

DABNEY, for defendants.

WALKER, J.

George W. Stancil, the nominated executor propounded for proof, in solemn form, a paper purporting to be the last will and testament of Owen H. Kenan, deceased, gave proper notice to the heirs at law, and several of them appeared, Michael J. Kenan being one, and filed their caveat. Pending the litigation, Michael J. Kenan died, leaving his estate, so far as appeared to the Court, unrepresented. Propounder appeared in Court and insisted on his right to prove the will as against the surviving heirs at law, Uriah T.

Kenan and the other caveators. The Court refused to permit the case to proceed until the estate of Michael J. Kenan should be represented; and this is the decision complained of.

[1.] In *Potts vs. House*, 6, Ga. Rep. 334, this Court decided that the propounder of a will holds the affirmative of the issue of *deviavit vel non*, and is, therefore, the plaintiff in the proceeding. In effect, it is a suit by the executor against the heirs at law to divest their title *as heirs at law* to the entire property of the deceased. The heirs at law are all interested in the proceeding, and all of them may make themselves parties and resist this action of the executor. In this case, several of the heirs at law did resist, and the case then became one in favor of the executor against all the caveators.

[2.] Upon the death of one of these defendants, what are the plaintiff's rights as to the trial of the issue? He may sue out *scire facias* to make the representative of the deceased a party in the cause. *Code, Sec. 3355*. But is he compelled to do so before he can proceed with his case? We think not, for the reason, that section 3377 says that in all cases against two or more defendants, one or more of whom shall have died pending said case or cases, the plaintiff may suggest said death of record and proceed to trial against the survivors *to the extent of their respective liabilities*. This right was denied the plaintiff, and we think the Court thereby committed error. See *Henderson vs. Hackney et. al.*, 13, Ga. R. 282. Of course the plaintiff will proceed at his peril. No judgment can bind Michael J. Kenan's unrepresented estate. His personal representative may hereafter come in and be heard in behalf of his rights; but this is no reason why the plaintiff may not proceed with his case against the surviving caveators, and conclude them, and all others notified and not objecting, by a judgment upon the issues joined as to the validity of the will.

Judgment reversed.

Loyd & Wells vs. Welch.

LOYD & WELLS, plaintiffs in error, vs. GEORGE B. WELCH,
defendant in error.

[1] Service effected after return term of the process. Amendments, when allowable and when not—not decided.

[2] Writ of error dismissed because brought while appeal was pending below.

Complaint. In Bibb Superior Court. Tried before Judge COLM. May Term, 1866.

The error alleged in this case was the refusal of the Court below to dismiss the action, because the process was made returnable to the November Term, 1865, and no service upon the defendants, according to the Sheriff's return, took place until May 5th, 1866.

The transcript of the record sent up to the Supreme Court showed that a verdict was rendered for the plaintiff, in the Court below, after this ruling; and that the defendants (plaintiffs in error here) entered an appeal. The appeal bond bears date July 9th, and the Judge's certificate to the bill of exceptions, July 23d, 1866.

Counsel for defendant in error moved, in this Court, to dismiss the Writ of Error, because brought while the cause was still pending in the Court below on appeal.

DEGRAFFENREID, for the motion.

POE, *contra*.

HARRIS, J.

[1] We are precluded from considering whether the Court exercised a sound discretion or not, in allowing the process of the Court which issued, unquestionably *correctly*, in which there was no error, and was according to the truth of the case, to be amended so as to make the date of its issue conform to the service of the Sheriff, in May, 1866; months after the period had expired, when, according to law, the writ should have been returned to office. We regret this, as it

would have furnished a proper case in which to have given an expression of opinion, as to whether there are not rational and legal limits as to amendments under our statutes; what amendments are matters of course, and what are not.

[2] The transcript of the record shows that the case is pending at this time on the appeal.

The general rule of this Court, and the practice has conformed to it, is not to entertain a writ of error to review any judicial errors complained of, whilst a case is thus pending.

There is nothing presented here why this case should be taken without this most useful rule, and, as defendant in error has made a motion to dismiss the writ of error for the reason assigned, we yield to it.

JOHN S. ROWLAND, Superintendent of the Western & Atlantic Railroad, plaintiff in error, vs. MARY E. CANNON, defendant in error.

The widow of an employee of a Railroad cannot recover for his loss of life, if by his own fault he contributed to the accident which occasioned his death.

Case. In Fulton Superior Court. Tried before Judge WARNER. October Term, 1866.

In July, 1862, Sylvester Cannon was in the employment of the Western & Atlantic Railroad as a locomotive engineer, and, on the Sabbath day, was running an engine attached to the regular passenger train from Atlanta to Chatanooga. It was unusual to run freight trains on the Road on Sunday, and on this occasion there was no reason to expect that any train would be in Cannon's way, neither he nor the conductor of his train having been notified that any

had been or would be sent out. In point of fact, however, a freight train was started out by the agent of the Road at Chattanooga to go to Atlanta, and near Johnson's Station it came in collision with Cannon's train, and he was killed. His widow brought suit against the Road for damages. At the trial, it appeared in evidence that by printed rules which were in the hands of all engineers, it was not allowable to run on that part of the Road at a higher speed than eighteen miles per hour, and that Cannon, at the time of the collision, was running at the rate of twenty miles per hour ; also, that if he had been running at but eighteen miles per hour, the collision would not have occurred at that place, (which was on a sharp curve) and might not have occurred at all ; that a quarter of a mile further towards Atlanta, the trains might have been seen by those upon them in time to prevent the accident, though still further on in that direction the result of a collision might have been much worse. It was in evidence that the rule restricting the speed to eighteen miles per hour, had been made on account of the condition of the track on that part of the Road, the iron being, when the rule was adopted, scrap iron, but that prior to this collision, it had been relaid with good iron, so as to become the best part of the Road. The rule, however, had not been revoked. On some other parts of the Road, a speed as high as twenty-eight miles per hour was allowed by the rules.

The Court, after charging the jury that if the injury was caused exclusively by the fault or negligence of the plaintiff's husband, she would not be entitled to recover, and if caused exclusively by other employees of the Road, she would be entitled to recover, added that if both parties were in fault, the plaintiff might still recover, but the jury should find such damages as they thought the plaintiff entitled to under the circumstances in proof.

The jury found for the plaintiff four thousand dollars (predicating their verdict, as to the amount, in part on evidence which is not embodied in the foregoing statement).

Whereupon the defendant moved for a new trial, on the ground of error in that part of the charge which recognized the plaintiff's right to recover if both parties were in fault.

The Court refused a new trial, and that refusal is the error now alleged.

MYNATT and **BLECKLEY**, for plaintiff in error.

BAUGH and **HOYT**, for defendant.

LUMPKIN, C. J.

The single question in this case is, can the widow of an employee of the State Road, if he is killed, recover damages for his loss of life, provided he, himself, is guilty, in part, of the accident which caused his death?

It is well settled, that a passenger or third person may recover, though he is partly to blame for the casualty. Does the same rule apply to agents of the Road? This depends upon the proper construction of the following Sections of the Code—(Sections 2054, 2979, 2980)—particularly the last of these sections, which reads as follows: "If the person injured is himself an employee of the Company, and the damage was caused by another employee, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

From these Sections, it would seem that if the person injured is himself an employee of the Company, and the damage was caused by another employee, without fault or negligence on the part of the person injured, his employment by the company would be no bar to the recovery, and, therefore, negatively, that it would constitute a bar if fault or negligence be imputable to him. The conclusion seems inevitable, from the language of the Code; and is it not promotive of good thus to interpret the Code? The strictest fidelity should be exacted of all the agents; and to allow one to hold the Road liable, when he himself contributed in

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part to the injury, seems to be wrong to the Road and the people generally, who are indirectly, but deeply interested in the fidelity of the employees.

Now, it is conceded that Mr. Cannon, the engineer on one of the colliding trains, was partly to blame for running it at undue speed, and that, too, contrary to the printed rules of the Superintendent, which he had in his pocket, and which are declared by the Code to be laws. Notwithstanding that other agents of the Road were not guiltless, he participated in their violation of rules which are laws to them. Is it sound policy to allow him, or his family, to recover, when, by reason of this violation of law, several lives, I believe, were lost, and extensive injury inflicted upon the machinery of the Road?

But it is not for us to reason about the matter. Such is the Code, and we must obey its behests; and, therefore, reverse the judgment of the Court below.

Judgment reversed.

GEORGE W. GARMANY, Agent of the Mechanics' Savings and Loan Association, plaintiff in error, vs. YUEL G. RUST, survivor of Sims & Rust, defendant in error.

Cotton was stored with a Warehouseman in 1862, and has been stored there ever since. The rates of storage at that time were 25 cents per bale, the first month, and 12½ cents for each subsequent month. It was admitted that the custom of warehousemen was to make "no change in charges on cotton already in store." Held, that the warehouseman was entitled to collect but the rates customary at the time of the storing.

Possessory warrant. Tried before Judge VASOK. At Chambers. November, 1866.

This was a possessory warrant, sued out by the plaintiff in error, against the defendant, on the 2d of November, 1866,

to recover possession of the cotton specified in the following receipt:

"Received from F. J. Champion, for G. W. Garmany, fifty-four four bales of cotton, marked and numbered as per margin, in the warehouse of Sims & Rust, at Albany, Georgia. Said bales of cotton to be delivered only to the order of the Mechanics' Savings and Loan Association, on payment of storage, (fire excepted.)

[Signed,]

SIMS & RUST.

January 29th, 1862."

Endorsed thus, "G. W. Garmany is hereby appointed agent for the Mechanics' Savings and Loan Association to receive the cotton above referred to, and to ship the same to Hiram Roberts, President, at Savannah. Said cotton to be held until the advance and all accumulated expenses are paid.

[Signed,]

HIRAM ROBERTS.

Savannah, January 27th, 1866."

Admissions made by the defendant.

1. That the Cotton was stored in the warehouse of Sims & Rust, Albany, Georgia, by ————, on the — day of ———, 18—; that subsequently it was sold to and became the property of the Savings and Loan Association, of which Hiram Roberts is President; that on the 29th of January, 1862, Sims & Rust gave to the Association their warehouse receipt for the cotton; that the receipt presented is the one given; that the signature thereto is genuine, and that Hiram Roberts' signature to the instrument on the back of said receipt, creating G. W. Garmany, agent, etc., is genuine.

2. That before the war it was the universal and uniform custom, and had been for many years, of warehousemen in Georgia, and in Albany, Georgia, to charge for storage 25 cents per bale for the first month, and 12½ cents per bale for each month thereafter; and that by said custom, these were

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the rates when this cotton was first received, and, also, when the aforesaid receipt was given.

3. That there was a like custom for warehousemen to retain cotton stored until it was ordered out by the owner.

4. That they had a right to present the accounts to the owners, at any time, for their storage; but it was the custom, most usually, to wait until the cotton was ordered out, and they did not attempt to enforce their liens upon cotton for storage until after demand and a refusal to pay.

5. That at the date of the receipt presented, the war was in full progress, and most of the cotton stored during the war remained in store until the war was over, because it could not be shipped to market in consequence of the blockade.

6. That the books of Sims & Rust show who stored the cotton in dispute, to whom it belonged, and where the owners lived.

7. That John G. Cook, agent for G. W. Garmany, did, on the 13th of January, 1866, make a demand for said Cotton, and tender, in payment of storage, seven hundred dollars in gold, to which demand and tender the defendant made precisely the same reply (copied below) which he returned to the subsequent demand made by H. Morgan, attorney.

Admissions made by the Plaintiff.

1. That Sims & Rust received this cotton on the 29th of January, 1862, and that storage is due from that date to the present time. That the storage, when the cotton was first received, was 25 cents per bale, and 12½ cents per bale for each month thereafter. That these were the customary rates at the date of the foregoing written receipt.

2. That on the 1st of September, 1862, Sims & Rust gave notice by advertisement in one of the Albany, Macon and Augusta papers, in substance as follows:

" WAREHOUSE NOTICE.

ALBANY, GEORGIA, 1st September, 1862.

All persons having cotton stored in our warehouse are

hereby notified, that on and after the 1st day of November, 1862, our rates of storage for cotton will be 50 cents per bale for first month, and 25 cents each month thereafter.

[Signed,]

SIMS & RUST."

That the notices were published by all the warehousemen in Georgia, and usually gave two months notice, and all parties having cotton stored were charged the increased rates. That Sims & Rust received the customary rates of storage charged, in Confederate money when tendered. That no money was ever tendered by plaintiff in payment of the storage on the cotton in dispute, until 13th January, 1866, and then only 25 cents for the first month, and 12½ cents for each month thereafter. That similar notices to the above were published from time to time, increasing the storage, until the surrender.

3. That since the surrender the customary rate of storage in Georgia, and in the city of Albany, on all cotton stored, has been 50 cents per bale per month. That this was an average, charged and agreed upon by all the warehousemen, and has been paid, usually, by all parties having cotton stored; and this is the amount claimed by defendant of plaintiff in the present currency.

4. That 50 cents per bale per month on cotton stored during the war, is not only the customary charge, but is reasonable and just, and only a fair compensation for the amount of labor, costs and care bestowed upon the proper protection of cotton during the war, and the value of the cotton. That owing to the exposed condition of cotton, and a general disregard of the rights of property incident to a state of war, it was worth more for storage than in a state of peace.

5. That defendant has proposed to turn over to plaintiff all of the cotton [except just enough to cover the lien for storage, and proffers to turn it all over upon payment of 50 cents per bale storage.

6. That it has been the custom from time immemorial, for warehousemen to change their rates of storage according

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the amount of labor, care, and expense necessary in protecting property stored, but no change in charges on cotton already in store.

7. That the following are the rates of storage charged during the war, two months notice being given before each increase:

From 1st Nov. 1862, 50 cents per month, 25 cents.

" 1st March 1863, 75 " " " 50 "

" 1st Sept., 1864, \$1.25 " " \$1.00

" 1st April 1865, \$2.25 " "

The following is the defendant's reply to the second demand made upon him:

" ALBANY, Nov. 6th, 1866.

H. Morgan, Esq. :

DEAR SIR :

Your communication of the 5th instant, signed as attorney for George W. Garmany, Agent, is received, in which you tender me \$412 00 in currency, in payment of my claim for storage on, fifty-four bales of cotton. I respectfully decline to receive the amount in full liquidation of my claim, but will receive it on account, and place the same to the credit of the owners of the cotton.

I claim storage on the fifty-four bales of cotton from January, 1862, to date, 4 years and 10 months, at 50 cents per bale per month, amounting to \$1566 00. This is the customary charge of the warehouses here, and no more. I will deliver the cotton upon payment of this claim, or retain in my hands to secure it, and deliver the balance, reserving to myself the right to sell the cotton left in my hands to pay my claim when I may feel disposed to do so.

Respectfully yours,

(Signed)

Y. G. Rust."

The presiding Judge awarded the possession to the plaintiff, upon condition of his paying storage at the rate of 25 cents per bale for the first month, and half that rate thereafter, up to November 1st, 1862, and 50 cents per month

from then up to the time of delivery, with interest on each years' dues from the first of the succeeding year.

The plaintiff complains of this judgment as erroneous.

WALKER, J.

[1.] We reverse the judgment in this case, under the facts admitted, upon the ground that Rust is entitled to collect but twenty-five cents per bale for the first month, and twelve and a half cents for each subsequent month, with interest added on the amount due at the end of each year, up to the time the money was tendered. Judge Lumpkin and I place our decision upon the sixth "admission by plaintiff," (a very curious "admission," I must say, to come from the *plaintiff*) "6th. That it has been the custom from time immemorial for warehousemen to change their rates of storage according to the amount of labor, care and expense necessary in protecting property stored; *but no change in charges on cotton already stored.*" By the "2d admission made by defendant," the price of storage was, as above stated—25 cents the first month, and 12½ the second. Judge Harris thinks that the customary rates, at the time of storage became a part of the contract, and could not be changed without the consent of the plaintiff, either express or implied. *In this case* the result is the same; and we unanimously reverse the judgment of the Court below.

HAMLEN J. COOK, plaintiff in error, vs. E. W. JENKINS, defendant in error.

[1.] In this case the award required the partner taking charge of the assets to indemnify his copartner against the firm liabilities. Even if such had not been the terms of the award, a Court of Equity should have required such indemnity; and in either case, therefore, it was proper not to dissolve the injunction without imposing such indemnity as a condition.

Cook vs. Jenkins.

Under the general prayer for relief, appropriate relief, on the case made should be granted [3.] Though discovery be expressly waived, an answer is still necessary as pleading. Whether, in such case, the answer can be excepted to by complainant, because not full, &c., not decided.

Award. Exceptions to Answer. Dissolution of Injunction. In Dougherty Superior Court. Decisions by Judge COLLE. June Term, 1866.

Cook filed his bill against Jenkins to settle a controversy touching the affairs of the late firm of H. J. Cook & Co., a copartnership, of which Cook and Jenkins were the members. The bill prayed for an injunction, which was granted.

On the coming in of the answer, the case was referred by the parties to arbitrators, under the act of March 5th, 1856, with full power to determine all questions that might arise in the case, according to the laws of Georgia, the principles of equity, and the rules of practice in the Superior Courts, either party having the right to except to the decision made upon any legal question, and carry the same to the Superior Court for adjudication.

The submission bore date September 21st, 1865.

The arbitrators, with the umpire selected by them, rendered an award; after notice of which, Jenkins filed his bill in equity to set the same aside, and prayed for an injunction to restrain Cook, in the meantime, from collecting and controlling the firm assets. The injunction was granted; and Cook, after answering the bill, moved, at June Term, 1866, to dissolve the injunction and dismiss the bill. Before this motion was heard, counsel for Jenkins excepted to Cook's answer. Counsel for Cook insisted that the exceptions could not be entertained, because the complainant's bill expressly waived and disclaimed any discovery, and the answer was filed simply to show cause why the injunction should be dissolved, and for no other purpose. The Court overruled the objection, took up and considered the exceptions; and this is assigned as error.

The Court refused to dissolve the injunction and dismiss

the bill unconditionally, but ordered that the same be done, on condition that Cook give bond to save the complainant, Jenkins, harmless on the firm liabilities. The prescribing of this condition is complained of as error.

At the same term of the Court, counsel for Cook moved to make the award the judgment of the Court; to which motion counsel for Jenkins filed written objections denying that the evidence authorized the arbitrators to find, as they did, upon certain points; or that the facts were sufficient to compel them to award as they did upon certain other points; and alleging, in general terms, that the award was the result of accident, mistake and fraud, and a violation of the law and of the articles of submission.

To these objections, counsel for Cook demurred. The Court overruled the demurrer, refused the motion to make the award the judgment of the Court, and ordered an issue to be made up on the objections. This, also, is assigned as error.

LEVIN, for plaintiff in error.

STROZIER and SMITH, for defendant.

HARRIS, J.

[1.] The defendant in error, upon receiving notice of an award having been made against him in the matters of difference between him and plaintiff in error, under the arbitration act of 1856, filed his bill in equity to set aside said award, and prayed and obtained an injunction to restrain his copartner, Cook, from collecting and controlling, whilst the litigation was pending, the partnership assets. The bill was answered, and objections filed to the sufficiency of the answer. A motion was made by plaintiff in error to dissolve the injunction, which was granted on the condition that Cook give bond and security to indemnify and save Jenkins harmless as to the firm liabilities. This requirement is assigned as error.

It seems to us that this condition is substantially in accor-

dance with the award ; but even if the arbitrators had failed to make such provision, a Court of Equity should have promptly interposed in behalf of the defendant in error. It would have been a great outrage to divest the defendant, however badly he may have acted, of all the assets of the firm—all his interest in the firm property—all power to collect, or control, or interfere with any of it ; indeed, to put all in the unlimited and uncontrolled disposition of Cook, and leave defendant stripped of all property and power, without any protection or indemnity against the demands or suits which might be made against him as a copartner. We apprehend that it belongs, necessarily, to the office of chancellor, when decreeing relief, to give, in every case under the general prayer, such relief as is appropriate, whether specifically asked or not. This power would have enabled the Judge below to have exacted security against the misapplication of the partnership assets ; but the indemnity required was such as the award authorized, as by it the firm debts were to be paid by Cook.

All objections to the award having been waived by the counsel for the defendant in error, we are relieved from at all looking into the voluminous transcript of the record accompanying the bill of exceptions.

[2.] Nor is there any necessity for considering and deciding in this case, whether a party defendant to a suit in equity is relieved from the duty of making a full and responsive answer to the bill because complainant has waived any discovery from defendant as a witness. It is very certain that an answer (notwithstanding the change made by statute) is still as necessary as a pleading as ever, and as such cannot be dispensed with. Many reasons occur to us why an answer, though discovery be waived, should still be full and responsive. Certainly, it is the safer course to adhere to old forms until they may be abandoned by authority. In thus expressing ourselves, we desire it to be understood that we do not thereby decide the point made ; it will be decided only after full argument and careful deliberation.

Let the judgment below be affirmed.

WILLIAM M. EVANS, plaintiff in error, vs. JAMES R. WALKER,
defendant in error.

Under the Ordinance of the Convention, the Judge has no right to tell the jury not to consider evidence of the value of Confederate currency at the time the contract was made, and restrict them to the value at the time the debt became due. The Ordinance being valid, it follows indisputably that the charge and refusal to charge were erroneous.

Complaint. In Taylor Superior Court. Tried before
Judge WORRILL. October Term, 1866.

Evans sued Walker on a promissory note, for one thousand dollars, dated May 4th, 1863, and due the 4th day of May next thereafter.

The plaintiff admitted that the consideration of the note was Confederate Treasury notes. It was agreed that at the date of the note the value of Confederate Treasury notes was one dollar in gold for five dollars of them, and that when the note became due the value was twenty dollars in Confederate Treasury notes for one in gold, and that at the time of trial Federal currency was at 45 per cent. discount for gold.

The Court charged that the note being given for Confederate notes, the presumption was that it was payable in the same currency, and the jury should ascertain the value of Confederate money at the time the note fell due, and find a verdict for the amount they might find due on that basis, with 45 per cent. added for the depreciation of Federal currency, with interest from the date of the note.

Counsel for plaintiff requested the Court to charge the jury that they might also take into consideration the value of the Confederate notes at the time they were borrowed, and render a verdict on that basis on principles of equity. The Court refused to charge as requested. To the charge, as given, and the refusal to charge, plaintiff excepted.

The jury returned a verdict for the plaintiff for \$77.50, with interest and cost.

CABINESS & PEEPLES, for plaintiff in error.

B. HILL, for defendant.

LUMPKIN, C. J.

Was the charge given to the jury in this case, as well as his refusal to charge, as requested by plaintiff's counsel, correct? We think not. The Ordinance passed by the Convention, the 8th of November, 1865, Section 2, provides: "That all contracts made between the first of June, 1861, and the first of June, 1865, whether expressed in writing or implied, or existing in parol, and not yet executed, shall receive an equitable construction, and either party in any suit for the enforcement of any such contract, may, upon the trial, give in evidence, the consideration and the value thereof at any time, and the intention of the parties as to the particular currency in which payment was to be made, and the value of such currency at any time, and the verdict and judgment rendered shall be on principles of equity: Provided, that contracts executed within the time specified, and which were simply in renewal of original contracts made before the said first day of June, shall stand upon the footing of contracts executed before hostilities commenced."

We concede there is trouble in giving to this Ordinance a proper construction. But our conclusion is this: that in that class of contracts embraced by it, to-wit, those made between the first of June, 1861, and first of June, 1865, the proper course to be pursued is this: Let the Judge who has the case to try, give the Ordinance in charge—the *whole* Ordinance—(not that every portion of it applies to every case that comes up) and then instruct the jury to consider the whole, not for the purpose of making a different contract from that entered into between the parties, but to ascertain their true meaning and intention, giving an equitable construction to the agreement, and then return a verdict on the principles of equity. We certainly think that the

Convention intended to give to the jury more than the ordinary discretion delegated to jurors, which should be respected by the Courts, unless flagrantly abused to the manifest wrong and injury of the parties.

Now, in the case before us, the Court excluded the jury from considering the value of Confederate currency at the time the note was given, or at any time thereafter, except when the debt fell due. True, the evidence was admitted; but of what avail was it to admit the proof, and then to exclude it from being considered by the jury. And this is certainly in the very teeth of the Ordinance, if the words "value of such currency *at any time*," have their appropriate meaning. Many of this class of contracts, embraced in the Ordinance, are impossible to be literally performed; as when payable in Confederate money, for instance. In this and all such cases the jury will have to arrive at what is equitable between the parties, and find accordingly.

Judgment reversed.

JAMES M. CALHOUN, and others, plaintiffs in error, vs. JAMES A. TULLASS, and others, defendants in error.

- [1.] One who purchases land subject to judgment liens, and contracts to pay off the judgments, will not be aided by equity to prevent the collection of such judgments out of the land, if he fails to pay them off in conformity with his contract.
- [2.] The purchaser of notes secured by mortgage may foreclose the mortgage at law by using the name of the mortgagee for his use, even against the consent of the mortgagee, by giving proper indemnity.

In Equity. In Catoosa Superior Court. Demurrer. Decided by Judge MILNER. November Term, 1866.

This was a bill filed by Tullass and others, vendees of a certain settlement of land situate in Catoosa county, against

Calhoun vs. Tullase.

Nichols, of the State of Florida, their vendor ; Calhoun, of the county of Fulton, a judgment creditor of Nichols ; Paris, of the county of Dade, another judgment creditor of Nichols ; and X. G., T. G. and C. D. McFarland, of the county of Walker, mortgagees of the same land, under said Nichols.

The case made by the bill was, in substance, as follows : On the tenth day of July, 1863, the complainants purchased said land from Nichols (who then resided in Catoosa county) at the price of \$35,000 00 in Treasury notes of the Confederate States, and Nichols executed to them his deed of conveyance with warranty of title. Nichols was then indebted to a large amount. There were many judgments and executions against him, as well as several mortgages on the land. It was a part of the contract that the vendees should proceed to take up the mortgages, judgments, executions and debts against Nichols, binding upon the land, to the amount of \$35,000 00, if there should be so much ; and if not, the remainder of the purchase money was to be paid to Nichols. But as it was unknown whether said debts were more or less than the purchase money, or whether the vendees, after paying the latter in full, would have a good and unincumbered title to the land, it was distinctly understood and agreed by and between the vendees, the vendor, and the mortgagees, that the vendees should take up the mortgages and executions, and hold the mortgages open as their property to save themselves from loss in the event it became necessary for their protection—that the money received by the mortgagees was not in payment of the mortgages, nor so to be, unless the vendees received a good and unincumbered title to the land.

The vendees went on and paid out to and for the vendor, in the aggregate, \$34,773 55 ; of which \$6,863 00 was paid to the vendor himself, under the belief that enough of the purchase money remained to take up all the liens on the land ; and under a like belief notes against him were taken up to the amount of \$4,349 96. The executions taken up

amounted to \$1,515 95, and the mortgages to \$15,707 91. The mortgages, without being entered, satisfied or marked paid, were delivered over to the vendees, and are still held by them; the understanding with the mortgagees at the time the latter received the money upon them being that said mortgages were to remain open in the hands of the vendees as their property, and for their protection in the event it became necessary. The mortgagees would then have executed to the said vendees a written assignment or transfer of the mortgages, but by mistake it was omitted, and they now decline to do so.

The vendees placed in the hands of an agent \$1,771 37, to take up two executions and a note against the vendor, one of the executions being that in favor of Paris, one of the defendants in the bill, which money the parties refused to receive, and it was lost.

Ten executions against the vendor, older than the mortgages, have been levied upon one of the lots of land embraced in the purchase, worth to the settlement \$1,500 00, and it has been sold under the levy, and is a total loss to the vendees. There are yet outstanding executions older than the mortgages to the amount of \$3,500 00, which will have to be paid out of the land, as the vendor has no other property subject to them. The land is not worth more in currency than \$10,000 00—less than enough to pay the mortgages—and, after paying the older executions, will not sell for half enough to satisfy them.

Calhoun's execution is for over \$4,000 00. Paris' is for \$1,500 00, or near that amount. Both of them are younger than the mortgages, but older than the purchase of the land by complainants. They have both been levied on the land, and complainants have interposed claims which are now pending in Catoosa Superior Court.

Complainants allege that they cannot foreclose the mortgages at law, because they have not been assigned or transferred. Also, that, under existing circumstances, there being mortgages and older and younger judgments, with the

of the complainants to have the mortgages foreclosed unsettled, the rights of the several parties claiming the proceeds of a sale of the land uncertain, and the complainants, therefore, unable to determine how or whether to bid at all for the land. Persons interested in causing it to bring as much as possible would, at any sale of the same under these younger executions, be embarrassed, if not deterred from bidding, so that the land would not sell for its full value, and the said Nichols and his creditors would almost necessarily be injured.

The bill prayed :

1. For a foreclosure of the mortgages and for a cancellation of the deed from Nichols to the complainants ; or, that the deed stand, and that the land be sold free from doubts, clouds, and suspicion as to the title, and the proceeds distributed to the mortgagees and judgments according to law.

2. For an assignment of the mortgages by the mortgagees, or for foreclosure without such assignment.

3. For an injunction restraining Calhoun and Paris from selling the land under their executions, and from pressing the claim cases to a trial.

4. For general relief.

Discovery from the defendants, or any of them, was expressly waived.

The defendants demurred to the bill on various grounds :

1. For multifariousness.

2. For the improper joinder of Calhoun and Paris as defendants to the bill.

3. For want of equity.

4. For want of equity as to Calhoun and Paris ; and because the subject matter of the bill, as to them, was already before a Court of law, and the remedy at law complete.

5. For want of jurisdiction, as to Calhoun and Paris.

The Court overruled the demurrer, and that is the error complained of.

CALHOUN and BROWN, for plaintiffs in error.

AKIN, for defendant.

WALKER, J.

[1.] Complainants contracted to take up the liens which were upon the land of Nichols, provided said liens should not exceed \$35,000; and, in consideration of such obligation, received a warranty deed to a valuable settlement of land. In compliance with their contract, they paid some \$18,000, or perhaps \$19,000, leaving some \$9,000 still, to which said land is subject. They now ask a Court of Equity to enjoin the persons holding these outstanding liens from proceeding to enforce them. In other words, complainants take a deed to the land, pay nothing to the owner, but obligate themselves to pay *these creditors*, fail to do so, and ask that the creditors be restrained from making their money out of the land—the very money complainants *promised to pay*, in consideration of a conveyance of the land to them. To state the case is to decide it, it seems to me. Complainants failed to comply with their contract, and asked to be relieved from the consequences of such failure; this is the whole case. It is needless to say a Court of Equity will do no such thing.

[2.] But the complainants say they have mortgages purchased from the Messrs. McFarland which were not assigned to them, and that it is necessary to go into Equity to foreclose them, because the mortgagees refuse the use of their names. Without expressing any opinion as to the effect of the *complainants* foreclosing mortgages against *their own land*, and to which, when they comply with their contract, they will have a clear and *unincumbered* title, we will say they have a right to use the names of the mortgagees for their use in a proceeding to foreclose. If the mortgagees object to such use of their names, the complainants may indemnify them against costs, &c., and use their names, even

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against their consent, in favor of the ends of justice, as has frequently been done in actions of ejectment. *Fain vs. Garthright*, 5 *Ga. Rep.* 6. *English vs. Register*, 7 *Ga. R.* 387. There being no equity in this bill, the Court erred in overruling the demurrer.

Judgment reversed.

WILLIAM TAYLOR, in right of his wife, and as Guardian of ADOLPHUS T., JAMES A. and MARIA MOUGHON; and JOSEPH A. DAVIS, in right of his wife, plaintiffs in error, vs. THOMAS J. FLINT, in right of his wife, and as Guardian of INDIA H. MOUGHON; and JOSEPH A. DAVIS, Administrator of THOMAS MOUGHON, deceased, defendants in error.

- [1.] The errors complained of, must be plainly and distinctly set forth in the Bill of Exceptions.
- [2.] When the family of a decedent embraces two sets of children, each set is entitled to an allowance of furniture, or to an equivalent in lieu thereof.
- [8.] The Constitutionality of a law is not to be called in question by a Court unless absolutely necessary.
- [4.] The Ordinance of 1805, for adjusting contracts according to equity, construed; and its constitutionality affirmed.

Award by Judge CLARK. At Chambers. August, 1866.

Mrs. Taylor and Mrs. Davis, together with the three minors of which Taylor is guardian, are the children of Thomas Moughon by his first marriage. Flint married the widow of Thomas Moughon, and is guardian of her child, the offspring of Moughon's second marriage.

After Moughon's death, the appraisers appointed by the Ordinary to set apart a years support, etc., to his family, assigned to the minors by the first marriage, among other things, ten thousand five hundred and forty-three dollars in

Confederate Treasury notes, "as an offset to the furniture set apart to Mrs. Moughon and child."

In March, 1865, and afterwards, the widow, now Mrs. Flint, bought of the administrator, property to the amount of \$27.897, in Confederate Treasury notes, with the understanding that such sum should be receipted for by her as a part of her distributive share of her deceased husband's estate.

In August, 1866, all the parties to this writ of error submitted to Judge Clark, with leave to except to his decision, divers matters touching the estate of Thomas Moughon; among them the following questions:

What amount, in present currency, shall be paid by the administrator to the guardian of the three minors, in lieu of such portion of years support as has not been consumed by them, or appropriated to their use?

What amount, in present currency, shall be accounted for by Thomas J. Flint, in right of his wife, in lieu of said sum of \$27.897, in Confederate currency?

In the award rendered by Judge Clark, he held, on the first question, that the appraisers were not authorized by law to allow the sum given as a set-off to the furniture set apart to the widow and her child, and he, therefore, disallowed that item altogether.

The second question he disposed of by reducing the \$27.897, in Confederate currency, to its value in gold at the time the property was purchased, holding that the Ordinance of the late Convention, in so far as it permits a valuation of property at any time other than the time of the contract, is unconstitutional, because the legal presumption is, that parties enter into a contract with reference to the value of property at the time when the contract is made, and not at a former or subsequent period.

LEVIN, for plaintiffs in error.

HINES & HONES, for defendants.

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HARRIS, J.

[1.] We have found it very difficult to collect from the bill of exceptions the grounds of error, which are alleged, generally, to exist in the decision of the many questions submitted to Judge Clark. A more imperfect bill we have never seen; carelessly drawn, and without the assignment of a specific error.

This laxity we are determined to arrest.

The bill of exceptions must contain the assignments of error, plainly and distinctly set forth. Nothing, it appears to us, can be easier than for counsel bringing up a case for review, to state the ruling or decision of the Judge, and wherein the error exists.

It will be our duty, upon motion, to dismiss, with costs, *hereafter*, such imperfect bills of exceptions; and, it is to be hoped, that no weak indulgence will lead us to tolerate such gross violations of positive rule.

But we have had to encounter other embarrassments; the case was not argued, nor were we furnished with briefs of the points made, and of the authorities to support them.

Under such circumstances, without the assistance to which we were entitled, we have had to grope our way through the record upon a voyage of discovery.

Thus situated, if we shall have failed to have comprehended the case, the causes which have led to such a result have been indicated.

[2.] It occurs to us that the Circuit Judge erred upon the fifth point submitted for his decision, in disallowing the award made by the appraisers to the first set of children of Thomas Moughon, deceased, of ten thousand five hundred and forty-three dollars, in Confederate Treasury notes. As the law making distribution of intestate estates contemplates equality, we do not perceive how its spirit can be preserved where there are two sets of children, as here, but by assigning, in kind, furniture to the elder set, as is required to be set apart for the widow and her children. Whilst it is true there is no

express provision requiring this to be done, it is very evident that it should be done, unless the elder set of children should have received the full shares to which they were entitled in other property. Whether they had received an equivalent for furniture, in other kinds of property, or not, we are unable to gather from the record; we have, therefore, inferred that they had not.

[3.] In reference to the opinion expressed by the Judge as to the Ordinance of the Convention being *unconstitutional*, if it permits or seems to permit a valuation to be affixed at a time different from the contract, we deem it unfortunate that he should have expressed an opinion even hypothetically. It was unnecessary, as it was apparent in his view the Ordinance was constitutional by confining the valuation to the time of the contract. His award should have been specific and in accordance with that view of the Ordinance which he deemed constitutional, and if with it thus made either party should have been dissatisfied, then the question, upon being brought here, would have required a direct decision whether the Judge's interpretation of it was right.

It is a rule of the highest Court in the United States, and which has been repeatedly and most emphatically approved and followed by this Court, never to allow the constitutionality of any law or Ordinance to be drawn into question and decided upon, unless such decision should be found to be absolutely necessary to a disposition of the case.

We would be pleased to see our brethren of the Circuit Bench carefully observing the rule stated, which we deem to be eminently wise, productive of harmony in the co-ordinate departments of government, and which was first announced by the most illustrious Judge America has yet produced—Chief Justice John Marshall.

[4.] In the case of *Slaughter, administrator, vs. Culpepper et. al.*, from Mitchell county, decided at this Term, we have expressed our opinion as to the constitutionality of that Ordinance. In that case, it was held that the Ordinance did not affect the contract itself, but was intended to prescribe a

Virgin vs. Dinkins.

rule of evidence so as by all the lights which could be thrown on a transaction, the contract might be ascertained, and then enforced on principles of natural equity; or, in other words, of compelling, as far as practicable, men to adjust their controversies upon the golden rule of doing unto others as they would be done by.

Let the judgment below be made to conform to this opinion.

JONATHAN A. VIRGIN and SAMUEL S. VIRGIN, plaintiffs in error, vs. PAUL S. DINKINS, defendant in error.

The purchasers of property agreed to pay for it to the vendor, who was to discharge certain debts out of the money thus received. The purchasers performed their part, but the vendor did not pay off the debts according to his undertaking. Held, that the purchasers will not be compelled, in Equity, at the instance of the creditors, to pay said debts. The purchasers are not trustees for the creditors.

In Equity. In Bibb Superior Court. Motion for New Trial. Decided by Judge COLLE. November Term, 1866.

Prior to September 3, 1853, Dinkins, the defendant in error, being the holder of an execution against one VanValkenburgh, entered into a contract with one Marcus A. Franklin, who held a mortgage upon some and had conditionally bought other property of the said VanValkenburgh's, not to press said execution against said property; and Franklin, on his part, agreed to cause the execution to be provided for or paid out of said property.

Subsequently to the making of this contract, Franklin and the plaintiffs in error entered into the following:

"Georgia, }
 Bibb County, }

We, the undersigned, being desirous of

 Virgin vs. Dinkins.

purchasing of Marcus A. Franklin, the property known as the VanValkenburgh property (*describing it*): Now, this is to make known that we occupy the above described property simply as tenants at will of said Franklin, until we shall pay or cause to be paid to him the following sums, namely: Six thousand five hundred and fifty-six dollars, together with lawful interest upon the same from date: (*also, certain notes described*) also the executions against said VanValkenburgh in the hands of John Ratherford—said executions being in favor of Paul Dinkins. * * The acknowledgment of M. A. Franklin as to the notes and executions referred to, shall be a sufficient identification. Now, the conditions of the contract are such, that so long as we shall pay to said Franklin the sum of \$300.00, every two months until the above amounts, namely, \$6.556.00, the notes * * and the executions * above mentioned, are fully paid, we are to remain in undisturbed possession and use of said property; and when said sums are fully liquidated, the said Franklin shall make full and sufficient titles to the property. * * *

Provided, nevertheless, if we or either of us should fail to make the payments upon the day and month as above agreed upon, namely, \$300.00 on the first day of every second month, the first payment falling due on the 1st September, 1853, and the succeeding payments on the first day of every second month thereafter, until the full liquidation of the sums hereinbefore mentioned, then this tenancy contract is void, and of no effect, and we admit the right of said Franklin to the above described property to be in full force, together with the power to dispossess us at discretion: Also, such sums as may have been paid to said Franklin, shall not be reclaimed by us, nor shall they bear interest from date of payment, but shall accrue to said Franklin as payment for rent of said property.

In witness whereof, we have hereunto set our hands and seals, September 3, 1853.

J. A. VIRGIN, [L.S.]
 SAM'L S. VIRGIN, [L.S.]

Witnesses—A. A. MENARD.
 GEORGE PAYNE.”

Virgin vs. Dinkins.

"I agree to be bound by the above contract in all particulars.

MARCUS A. FRANKLIN, [L.S.]"

In April, 1866, Dinkins filed his bill in Equity against the two Virgins, praying that they might be compelled to perform specifically the foregoing covenant in his behalf, by paying to him the amount due upon his said execution against Van Valkenburgh.

At the trial the facts were agreed upon by counsel as follows: "That the contract set out in the bill was mutually executed by M. A. Franklin and defendants; that the *fi. fa.* spoken of therein, as being in favor of Paul Dinkins, was then, and now is, the property of said Dinkins, and so known to defendants; that in the settlement between the defendants and Franklin's Administratrix, evidenced by the receipt, the substance of which is copied on this paper, said Dinkins' *fi. fa.* was not spoken of, nor any money specifically paid by defendants for the extinguishment of said *fi. fa.*, nor has it been paid to plaintiff, or to Franklin or his representatives, unless the said receipt proves it; that defendants' answer sets up and relies upon said receipt; that the bill correctly sets out the agreement between Franklin and Dinkins as to providing for said *fi. fa.*; that the Virgins made a full settlement with Franklin's Administratrix, and got title to the property specified therein; and that said receipt certifies the settlement to be in full of the stipulations of the Virgins' agreement with Franklin's estate.

Copy Receipt.

"The stipulations and payments under the within contract have been fully complied with by a settlement and compromise this day made with Messrs. J. A. & S. S. Virgin, this April 13, 1859.

L. N. WHITTLE,

*Attorney for Mrs. M. A. Franklin,
Executrix of M. A. Franklin.*

The jury found and decreed in favor of the complainant, after which the defendants moved for a new trial:

1. Because the jury found contrary to the evidence.

2. Because the Court erred in charging the jury there was privity between Dinkins and defendants, arising on the contract between defendants and Franklin; and that he could recover on such contract, notwithstanding the receipt of Franklin's representatives extinguishing the said contract, and in full of the stipulations of the Virgins' agreement with Franklin contained therein.

3. Because the Court erred in charging the jury that, after a full settlement with Franklin, Dinkins had a right to open the settlement and explain such receipt; and if the jury believed the Dinkins *fi. fa.*, agreed to be paid by the defendants, had not been paid, they ought to find for the complainant.

The Court refused a new trial, and that is complained of as error.

LOCHRAKE & BACON, for plaintiffs in error.

RUTHERFORD, for defendant.

LUMPKIN, C. J.

Dinkins' execution not having been paid under the agreement between Dr. Franklin and the Virgins, the question is, can a Court of Equity hold the Virgins as trustees for Dinkins' debt, and they decreed specifically to pay it? We think not.

They never stipulated to perform the contract of September, 1853, made with Dr. Franklin for the benefit of Mr. Dinkins. They never undertook to pay him, or cause him to be paid, by Franklin, one dollar. In fixing the amount that the Virgins were to pay Franklin, Dinkins' debt is mentioned, and in this connexion only. But for this purpose it never would have been referred to.

The evidence shows that the Virgins have punctually kept what seemed to be a rather stringent contract. The whole

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consideration for the purchase made of Franklin has been discharged. If Dinkins can look to any other person than VanValkenburgh to pay his execution, equity would seem to point to another, and not the Virgins. That Franklin could be charged as trustee for Dinkins may be admitted; but we totally deny the liability of the Virgins to be made trustees under this agreement. What privity is there between them? None. As to Franklin being made a trustee for Dinkins, we withhold our judgment on that point, as it is not made in the case now before us.

We have examined carefully the authorities of *Gordon vs. Gordon*, 3, *Swanston* 399, and the long note appended to the report; also, the case of *Gregory and Parker vs. Williams*, 3, *Merivale* 580, and the marked distinction between these two cases and the one before us is, in the former there is privity in contract; in the latter there is none.

As to the proposition to open the receipt executed by Dr. Franklin's estate to the Virgins, the same objection applies. What right has Dinkins to interfere in this matter? It is between third parties, and any settlement between them does not concern him. If any property has been transferred by Franklin to the Virgins belonging to VanValkenburgh subject to Dinkins' execution, his lien is not displaced, unless his agreement with Franklin has had that effect.

Judgment reversed.

ABRAHAM DYSON, plaintiff in error, vs. SUSANNAH E. BECKAM,
Executrix of SOLOMON G. BECKAM, deceased, defendant in
error.

[1.] The formal words of the jurat to answers to interrogatories may follow the names of the commissioners, as well as precede them.

[2.] A nonsuit should not be awarded, if there be any evidence upon which a verdict for the plaintiff could be rendered.

Complaint. In Calhoun Superior Court. Tried before Judge CLARKE. September Term, 1866.

This was a suit upon an open account for \$374.38, the main item of which is for work and labor on lot of land No. 265, 4th district, Calhoun county, \$350.00.

On the trial, interrogatories tendered by the plaintiff were objected to, on the ground that the jurat was not certified to by the commissioners.

The names of the commissioners were signed on the left, immediately under the interrogatories, followed by the jurat, arranged thus :

"A. B. Com.

"C. D. Com.

Sworn to and subscribed," &c., &c.

The Court sustained the objection—ruled out the interrogatories, and plaintiff excepted.

The defendant objected to the statement in the depositions of Benjamin H. Jones, hereinafter set forth, and to the same statement made by several of the witnesses, "That the land on which plaintiff lived and put the improvements belonged to Solomon G. Beckam," and to all parol evidence, as being incompetent to show title or interest of Beckam in the land. The Court sustained the objection, but allowed the witnesses to make the statement, saying that he would regulate or qualify the matter in his charge.

▲ The plaintiff introduced the following evidence :

Thomas M. Maund says plaintiff went upon the lot of land belonging to Beckam, in the life time of Beckam, and put improvements thereon, consisting of a dwelling house, kitchen, smoke house, horse lot, stable and shelter, a well, a garden, and cleared up five or six acres of land, worth, altogether, \$350.00. After the improvements were made, Beckam sold his settlement of land, and with it his lot (No. 265.) After this sale witness heard Beckam say to plaintiff that he would pay him (plaintiff) out; that three hundred or five hundred dollars was no money to him (plaintiff.) Wit-

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ness understood this conversation to relate to paying plaintiff for the improvements on the lot.

Kinion Strickland says that plaintiff put improvements worth \$300 on lot of land No. 265, belonging to Beckam. In a conversation between plaintiff and Beckam, soon after plaintiff commenced the improvements, Beckam said he (Beckam) had promised to clear him (plaintiff) twenty acres of land; but, finding he could not do so, offered instead to let plaintiff cultivate a part of Murchison place. When Beckam sold out he sold lot No. 265 also.

David E. Lewis says that the improvements were worth \$300. Beckam sold this lot with the improvements when he sold his other land. Plaintiff was on the lot two, or a part of two years, using the improvements as he placed them there; but they were worth nothing for rent, as he was carrying on the improvements all the time. Witness had a conversation with Beckam and plaintiff shortly after Beckam sold out. Beckam, in speaking of plaintiff's removal from the lot, said that he (Beckam) would pay him (plaintiff) out; that three hundred dollars, or five hundred dollars was no money to him (Beckam.)

Benjamin H. Jones—deposition—Plaintiff lived on and improved a lot of land belonging to Solomon Beckam, during his life time. He put up a dwelling, kitchen, smoke house, corn crib, stable and well, garden and yard pailed in, and made a small clearing—all worth five hundred dollars. Witness did not hear Beckam say anything about it. Plaintiff went on the land in the woods. Witness lived about four miles distant.

The plaintiff here closed, and defendant moved for a non-suit, which was ordered, and plaintiff excepted.

C. B. WOOTEN, for plaintiff in error.

STROZIER and DUNN, for defendant.

WALKER, J.

[1.] The interrogatories of certain witnesses were rejected because the *jurat* was not certified to by the commissioners. The ground of objection was that the names of the commissioners were signed immediately above, and not below the words "sworn to," &c. No question was made as to the fairness of the testimony; no denial that the statement that the answers were sworn to by the witnesses was made by the commissioners themselves. We apprehend the difficulty arose from the want of experience on the part of the commissioners, who were probably persons not accustomed to the execution of interrogatories. They, however, make the proper certificate; and the fact that it follows, rather than precedes their names, is not sufficient to exclude the testimony.

[2.] Ought the Court to have nonsuited the plaintiff? The rule on this subject is, "that if there be any evidence upon which a verdict could be rendered, the case should not be withheld from the jury." *Tyson et. al. vs. Yawn*, 15 Ga. R. 493. Was there any evidence in this case upon which a verdict could be rendered? There is an abundance of proof that 'plaintiff did a considerable amount of work on the land of defendant's testator, and the only question is whether it was done at his "instance and request." Two or three of the witnesses speak of the testator promising to "pay the plaintiff out," &c., but these promises were made after the work had been done. One witness—Kinion Strickland—says (I copy from the bill of exceptions) "that he heard a conversation between plaintiff and said Beckam, soon after plaintiff commenced the improvements, in which Beckam said that he had promised plaintiff, when he came upon said lot of land to make the improvements, that he would clear him twenty acres of land; that he found he could not do so; but instead thereof he would let plaintiff cultivate a part of the Murchison place." Without deciding whether this was sufficient evidence or not, we think there is evidence upon which a verdict might be rendered, and that, therefore, the plaintiff had a right to have a jury pass upon

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the merits of his case; and that the Court, in denying him this right, committed error.

Judgment reversed.

JOHN J. RILEY, plaintiff in error, vs. JAMES E. MARTIN, defendant in error.

The Deputy Marshal of the State, having in his hands an execution issuing from the District Court of the United States, in favor of A—against B—levies the same on the property of C, which he sells, and appropriates the proceeds to A, the plaintiff. *Held*, that an action of Trover will lie at the instance of C, against the Deputy Marshal, to recover the value of said property, with the interest thereon.

When slaves are wrongfully converted, previous to emancipation, the plaintiff is entitled to recover the value thereof.

Trover. In Bibb Superior Court. Tried before Judge COLE. May Term, 1866.

This action was brought by Martin, the defendant in error, against Riley, the plaintiff in error, for the conversion of a negro slave named Jack.

At the trial, the plaintiff declared his option to take a verdict for the value of the negro, not for the negro himself.

The case made by the evidence was substantially as follows:

The negro was sold in 1858, by John Martin to the plaintiff below, James E. Martin, for \$900.00. A bill of sale was made, and the purchase money paid, but the negro remained in the possession of John Martin. Afterwards, John Martin acted as the agent of James E. in a copartnership bar room business, the other partner being one Joseph A. Boon. He also, as the agent of James E., hired the negro to Boon, or rather, it would seem, Boon took an interest of

one-half in the negro's services for about five months, and paid one-half his wages.

While the possession was in John Martin and Boon, the negro was levied upon as the property of John Martin, by Riley, the plaintiff in error, as Deputy Marshal of the District Court of the United States, by virtue of an execution from that Court, against John Martin and Lindsey H. Durham. Durham having, to save his own property from levy, pointed out the negro to Riley and the Attorneys for the plaintiffs in execution, to be levied upon, and having also given to Riley, to indemnify him, a mortgage upon negroes.

Under this levy, the negro Jack was sold on the 8th of August, 1860, by Riley, as Marshal ; and was purchased by James E. Martin, the defendant in error, and the purchase money (\$1.000.00,) was paid by the latter to the former, and by the former to the Attorneys for the plaintiffs in execution. The value of Jack, at that time, was about \$800 or \$1.000.

The Court was requested by Riley's counsel, to charge as follows :

1st. That the defendant, having in levying upon the negro Jack, acted as Deputy Marshal of the District Court of the United States, under instructions of the plaintiff in execution, by virtue of a fi. fa. in his hands, issued upon a subsisting judgment obtained in said Court, his levy and seizure of the negro was not a tort, and he was not guilty of a conversion ; and therefore, the plaintiff is not entitled to recover in this action.

2d. That the slave, Jack, having been emancipated by the action of the Federal Government, the loss of the slave fell upon the owner : That the plaintiff's right to recover in Trover depends upon his title ; and if the jury believe that the evidence established title in the plaintiff to the negro Jack, he could not recover his value, and they would find accordingly.

These charges the Court declined to give ; but instructed the jury that in this case, the levy and possession of the ne-

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gro by defendant was a conversion, and would authorize the plaintiff to recover the value of said negro, if they believed, from the evidence, that the plaintiff owned the negro, and that such levy was made, and defendant took possession of him. Also, that if the jury believed, from the evidence, that the plaintiff was the owner of the negro, and that the defendant levied upon and took possession or control of him, and that his value was also proven, the plaintiff was entitled to recover his value, with interest thereon from the time of the conversion, and they would find accordingly.

The jury found for the plaintiff one thousand dollars, with interest from August 8th, 1860.

It is now alleged that the Court erred in refusing to charge as requested, and in the charge as given.

E. A. & J. T. NISBET, for the plaintiff in error.

WHITTLE for defendant.

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Riley, as Deputy Marshal of the State, levied an execution from the District Court of the United States, upon a negro, as the property of John Martin, as defendant in execution. Riley takes the negro into his custody, sells him, and appropriates the proceeds to the plaintiffs in *fi. fa.* The defendant in error brought Trover against Riley, to recover the value of his property thus taken under an execution against John Martin. The Marshal was induced to make this levy by Durham, the security of John Martin, giving him a mortgage to indemnify him for so doing. Emancipation has rendered this security valueless. But is this a sufficient reason to justify Riley in thus using an execution to sell the property of James E. Martin? The conversion of Riley being previous to emancipation, he, of course, must pay the value of the negro. James E. Martin, having re-

purchased the negro at the Deputy Marshal's sale, he, of course, loses the negro by freedom ; and Riley the benefit of his mortgage taken from Durham. So that manumission is not only a *two-edged* sword, but rather like the flaming sword placed at the East of the garden of Eden, at Adam's expulsion, *turning every way* towards the community.

Judgment affirmed.

ALLEN GAY, SR., plaintiff in error, vs. WILLIAM L. MITCHELL,
Executor of ROBERT TAYLOR, deceased, defendant in
error.

One who goes into the possession of land as a mere "squatter," disclaiming title, holds as tenant at will of the true owners, and cannot, by secretly attorning to another, change the character of his possession so as to make it adverse.

Motion for New Trial. In Early Superior Court. Decided by Judge CLARKE. April Term, 1866.

An action of complaint, brought by the defendant in error against the plaintiff in error, to recover a lot of land, was tried before Judge PERKINS, at April Term, 1861, of Early Superior Court.

Gay, the defendant in the Court below, had a paper title from the State down to himself. The executor of Taylor, the plaintiff in the Court below, relied upon color of title and possession under it for more than seven years. To make out such possession, it was necessary that the occupancy of one Daniel Kirkland should be counted as the possession of Taylor, and there was evidence tending to show that Kirkland, although he subsequently attorned to Taylor, held originally under one Richard Gay who held under Curry, a *squatter*. There was no evidence that Allen Gay, Sr., or

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those under whom he claimed, had any notice or knowledge of Kirkland's recognition of Taylor's title.

The Court charged the jury, among other things, that where a party goes into possession of land, disclaiming title, he is a mere squatter, and holds in subordination to the rights of the true owner—not as his tenant, and, therefore, not for him; that, going in as a squatter, his possession is not adverse, and, not being his tenant, can, after being in, agree with another to hold for him, and it is not necessary that the knowledge of such change of possession should be brought home to the true owner to make such possession adverse.

The jury having found for the plaintiff, the defendant moved for a new trial, on the ground of error in this charge, and on various other grounds.

The motion was heard by Judge CLARKE, at April Term, 1866, who overruled it, and refused a new trial. This is the error alleged.

Hood, for plaintiff in error.

DOUGLASS, for defendant.

Judge HARRIS did not preside, one of the parties being a relative.

WALKER, J.

As early as the case of *English vs. Register*, 7 Ga. R. 389, this Court decided that when the tenant in possession disclaims having any title to the premises, the presumption of law is that he holds the possession *in subordination* to the title of the true owner. In delivering the opinion, Judge LUMPKIN, p. 391, says: "The legal principles which I assert and maintain are, first, that he who has a perfect legal paper title to the land, is presumed in law to be *seized* and *possessed* thereof. Second, that such seizin and possession is

co-extensive with the right specified in such paper title, and continues in such true owner of the land, until he is *disseized* or *ousted* from such possession by the *actual* possession in another, under *color* of title or a *claim of right*. Third, that the statute of limitations does not commence to run against the true owner of land, who is presumed in law to be in the possession thereof, until he is *disseized* and *ousted* of such possession by the *actual* possession of another, who enters upon the land, under color of title, *hostile* in its *inception* to the title of the true owner; or when one enters upon the land and takes actual possession thereof, without paper title, under a claim of right." This has been, ever since, the doctrine of this Court. In *Larson, administrator, vs. Croningham, administrator*, 21 Ga. R. 454, this Court decides that, "A possession that in its commencement is not adverse, becomes adverse only when the holder, changing his mind, *intends* it to become adverse, and *knowledge* of such his change of mind comes to the true owner." In *Stamper vs. Griffin*, 20 Ga. R. 312, the point decided by the Court is stated in these words: "He who has the title to land, is to be deemed to be in the seizin and possession of it, and to continue so until ousted thereof by an actual possession in another, under a claim of right. The possession of one who enters, disclaiming title, is to be considered as a possession by the consent of him who has the title; nor will a continuance of this possession avail to mature a title under the statute of limitations, until the character of the possession has been changed, either by a declaration to that effect, *communicated to him who has the title*, or by the exercise of acts of ownership *inconsistent with a tenancy* by the consent of him who has the title." In delivering the opinion of the Court, p. 324, Judge Benning says: "Therefore, we think that if Booty entered as a '*squatter*'—entered disclaiming title, he was to be considered as holding the possession as *tenant at will* to the true owner, and as remaining such tenant until something happened which might serve to notify the true owner that Booty had ceased to hold as such tenant,

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and was holding adversely to him. What this something would have to be, we do not undertake to specify. We think, however, it would have to be somewhat more than a private attornment to the tenant to another claimant of the land." From these authorities, it follows that the Court erred in overruling the motion for a new trial; and instead of giving to the jury the charge, as set out in the 8th ground of the motion, he should have charged: That if Curry went into possession of the premises in dispute as a mere "squatter," disclaiming title, and sold his claim to Richard Gay, and Gay to Daniel Kirkland, that Kirkland's possession would be in subordination to the title of the true owner, and not hostile thereto. And that in order to make such possession adverse, something must be shown to have happened which might serve to notify the true owner that Kirkland ceased to hold as his tenant, and was holding adversely to him; and the mere private attornment to some one also claiming the land without any legal title thereto, would not be sufficient to change the possession from a subordinate to an adversary character.

Judgment reversed.

GEORGE T. BARTLETT, plaintiff in error, vs. HARRELL N. BYERS maker, and THOMAS J. SAUNDERS, indorser, defendants in error.

The maker of a note, and one endorsing it, "to be liable in the second instance," cannot be sued together in the same action.

Complaint. In Butts Superior Court. Tried before Judge Speer, September Term, 1866.

This action was upon a promisory note, made by Byers, and endorsed by Saunders as follows : "I endorse the within in the second instance, for value received, Sept'r. 15th, 1860."

The suit being against the maker and endorser jointly, counsel for the latter moved to dismiss it as to him.

The Court granted the motion, and this is assigned as error.

BARTLETT & PROUDFET, for plaintiff in error.

HENDRICK, for defendants.

LUMPKIN, C. J.

I feel strongly inclined to sustain this action. I can see some decided advantages growing out of such a practice. I hope the Legislature will make it lawful. The endorser is usually more interested than the holder of such a note in contesting the insolvency of the maker ; and the verdict of the jury might be so moulded under the Code, as to first pursuing the property of the maker, the adjustment of costs, &c., as to make it work well, as on suits in administrator's and guardian's bonds. But the difficulty is, the endorser is not liable to an action, until the insolvency of the maker is established, and he notified of the fact. To institute a suit against him before this, would seem contrary to principle and his contract. He ought not to be harrassed with a suit before this condition precedent is performed.

Upon the whole, however reluctantly, we feel constrained to affirm the judgment.

Judgment affirmed.

Georgia R. R. vs. Kirkpatrick.

THE GEORGIA RAILROAD & BANKING COMPANY, plaintiff in error, vs. JOHN L. KIRKPATRICK, defendant in error.

The act of 1859, *pamp. p. 48*, except so far as it is incorporated in the Code, is repealed; and, therefore, although the injury in this case was committed in DeKalb, suit should have been brought in Richmond county.

Trespass. Demurrer to Declaration. Decided by Judge WARNER. In DeKalb Superior Court. October Term, 1866.

The suit was brought by the defendant in error against the plaintiff in error in October, 1866. The declaration alleged a trespass upon the land of the plaintiff below, situate in DeKalb county, where the action was brought, by the Railroad Company, committed in the year 1865, by entering upon said land, and cutting down and destroying the trees and underwood thereon. The declaration also contained a count in trover for divers cross-ties, the property of the plaintiff, alleging a conversion of the same by the defendant, in said county.

It was admitted that the principal office of the defendant was, and ever had been, in Richmond county.

Defendant demurred to the declaration, and moved to dismiss the same, on the ground that the Court had no jurisdiction of the cause of action.

The Court decided in favor of the jurisdiction, and refused to dismiss the cause; and this is assigned as error.

GLENN & SON and BLECKLEY, for plaintiff in error.

CANDLER, for defendant.

WALKER, J.

Had the Superior Court of DeKalb county jurisdiction of this case? The act of 1859, *pamp. 48*, says: "No suit against a Railroad Company in this State shall hereafter be dismissed for want of jurisdiction in the Court in the

county in which said suit may be pending, or hereafter brought; *provided* the road of such company is located in, or shall run through, the county in which such suit is or may be pending; *provided*, further, *the cause of action arose, or the contract was made*, or to be performed in the county where the suit is instituted." The *Code*, sec. 3313, says: "*All civil cases in law (except as hereinafter provided)* shall be tried in the county wherein the defendant resides." Section 3317 provides for suing Railroad companies in the county where the cause of action originated, for the recovery of damages caused "by the running of the cars or engines;" and, also, on all *contracts to be performed* in the county where suit is brought." Here, it will be observed, the words "the cause of action arose, or the contract was made," and which are found in the Act of 1859, are omitted. These two classes are not within those excepted out of the general provision made by section 3313. We think, therefore, that the two sections of the Code cited show clearly that a case like this must be sued "where the defendant resides;" that Richmond, and not DeKalb county, has jurisdiction of this case; and that the action must be dismissed.

Judgment reversed.

CHARLES J. JENKINS, plaintiff in error, vs. THE MAYOR and TOWN COUNCIL of the Town of Thomasville, defendants in error.

City authorities, under the usual grant of power contained in their charters, cannot by ordinance declare those acts offences against the city, which by the general law are defined and made punishable as offences against the State.

Certiorari. In Thomas Superior Court. Decided by Judge HANSELL. July, 1866.

Jenkins vs. The Mayor and Council of Thomasville.

On the 23d of January, 1866, the plaintiff in error was tried in fourteen cases, by the Mayor, in the Municipal Court of Thomasville, upon charges of having, on the 11th of the same month, furnished to colored men spirituous liquors, in violation of an ordinance of said town.

He presented no plea to the jurisdiction, written or verbal—was present at the trial, and took part in the examination of the witnesses.

He was convicted and ordered to pay a fine of fifty dollars in each case, which he did.

The negroes to whom he furnished the liquors were soldiers of the United States, stationed at Thomasville; and their commanding officer arrested him and turned him over for trial to the Mayor, the officer himself assisting the Mayor in the investigation.

The ordinance under which he was tried was of a date anterior to the abolition of slavery, and was as follows:

* * * "And any person selling or giving spirituous liquors to a negro not his own, or person of color, on conviction before the Mayor, shall be fined not exceeding fifty dollars."

His counsel carried one of the cases, by certiorari, to the Superior Court, and at the same time signed, with the Mayor, the following written agreement:

"It is agreed by the Mayor and Council of Thomasville, and the counsel of defendant, that the above cases may be consolidated, or that the one case may be carried to the Superior Court by the certiorari, for the purpose of determining the question as to whether the Mayor and Council had jurisdiction or right to determine the cases, and that the decision in the one case, or the cases consolidated, shall control and govern all the other cases."

The grounds taken in the petition for certiorari were:

1st. That the act charged was not punishable under the statutes of Georgia, or by the corporate authorities of Thomasville.

2d. That the ordinance became inoperative by the aboli-

tion of slavery, and was in conflict with the Constitution of the United States, and with the Constitution and laws of Georgia.

3d. That by reason of the abolition of slavery and the establishment of equal rights, the ordinance had become null and void.

4th. That the offence, if any, was indictable and triable alone in the Superior Court by jury, and the corporation Court had no jurisdiction.

At the hearing in the Superior Court, the presiding Judge dismissed the certiorari and sustained the judgment below, holding that the party ought to have pleaded or excepted to the jurisdiction in the first instance.

SEWARD and WRIGHT, for plaintiff in error.

ALEXANDER, for defendants.

LUMPKIN, C. J.

The plaintiff in error was arrested and tried on fourteen cases by the municipal authorities of Thomasville for selling spirituous liquors to free persons of color, contrary to the ordinances of said town; and, on conviction, was fined \$50 in each case.

The State having passed a law upon the same subject, to allow the authorities of Thomasville to punish it as an offence against their ordinances, would be either to oust the jurisdiction of the State in the premises, or to punish the offence twice—once by the State, and again by the town.

There is another objection to this proceeding. In these cases the accused was tried by the Mayor and Council without the intervention of a jury; whereas, in the State Courts, he is entitled to the benefit of this Constitutional privilege. 21 *Ga. Rep.* 80.

The line is not very accurately drawn where municipal power ends and State authority begins. The former has

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ample space to legislate without trenching upon the jurisdiction of the State. In all doubtful cases, it would be better for the corporate authorities to arrest and commit the offender for trial before the proper State tribunals.

There is another difficulty in this case. Since our anti-slavery ordinance was passed, is there any such class as "free persons of color?" We have "freedmen;" but because of African descent, can they be called technically and properly now "free persons of color," as they were under the old law? Free persons of color were restrained by the law, as it formerly stood, from doing many things which freedmen can now do without let or hindrance. What I would suggest is this: Is there now, and can there be, any such crime as that of selling spirituous liquors "to free persons of color?" I know that we have a statute which declares that all offences shall be punished under the law which existed at the time the offence was committed, notwithstanding its subsequent repeal. But does this provision apply when the *status* of the person is changed entirely? I forbear to enlarge upon this subject.

Judgment reversed.

JOHN D. DUDLEY, plaintiff in error, vs. CHARLES LOVE, defendant in error.

[1.] A Court of law should, in a proper case, grant a continuance, to allow a party who has an equitable defence to enjoin the proceeding at law.

[2.] If a material witness be a surety on the bond of a tenant, given under the act of 1866, the Court hearing the case should allow another surety substituted, to make the witness competent.

Statutory proceeding against tenant holding over. In Clay Superior Court. Tried before Judge CLARKE, June Term, 1866.

Love, by his agent, made the requisite affidavit, and procured a summary process to remove Dudley from certain premises as a tenant holding over. Dudley, on the 21st of May, 1866, made his counter-affidavit, denying the tenancy, and gave bond for double rent, &c., in compliance with the statute, with one Peterson as security. The papers were returned to the June Term of Clay Superior Court, which was held some twenty or twenty-five days thereafter, at which time Dudley presented to the presiding Judge a bill praying an injunction against this proceeding at law, and setting up an equitable defence to the same. The Judge heard the application for injunction, and refused it because the bill did not allege that certain Confederate money deposited by Dudley in his own safe, after making a tender of it to pay for the premises, had been kept by him for Love until it became valueless. In about one hour after this decision was made, the summary [proceeding] came up in its order for trial, and counsel for Dudley moved for a continuance, so that he might have time to amend his bill to meet the objection against granting the injunction which the Judge had specified, declaring his intention to make the amendment. The Court refused to grant a continuance.

In the course of the trial, Dudley introduced as a witness, Peterson, the security on his bond, who, as the record shows, had knowledge of several facts material to the case. Upon his competency being objected to by the plaintiff, on the ground of his being security on the bond, Dudley offered to substitute other solvent and sufficient security, or to give a new bond with like security, and thus make Peterson competent; but the Court refused to permit this to be done, and ruled out Peterson's evidence.

A verdict was found for the plaintiff; after which, the defendant moved for a new trial on numerous grounds, among them, the refusal to grant a continuance, and the rulings of the Court touching the witness, Peterson.

A new trial was refused, and this is complained of as error.

Dudley vs. Love.

BOWER, for plaintiff in error.

HOOD, for defendant.

WALKER, J.

[1.] We think the Court should have continued the case, to allow defendant to prepare his bill, so that he might be able to set up his equitable defence. The proceedings had been instituted within less than a month ; from a verdict in that case, there was no appeal ; defendant had used due diligence in preparing his bill, except that it lacked an allegation which the Judge deemed important, and which allegation the counsel stated he intended to put in ; and we must believe his statement. With this addition to the bill, the Court had in effect, decided that the party was entitled to an injunction to restrain the common law proceeding ; and under this state of facts, ought not the case to have been postponed until the defendant could have prepared his pleadings ? We think so most clearly.

[2.] We think the refusal of the Court to permit Peterson to be relieved from liability, so as to make him a competent witness, was an error. It is a common practice, sanctioned by repeated decisions of this Court, to allow a party to release a surety by the substitution of other good security, in order to make the first surety a competent witness ; and we see no good reason why the same practice should not prevail in cases of this character. The statute simply requires that the tenant tender a bond with good security for the payment of the sum which may be recovered against him on the trial : *Acts* 1865-6, p. 35. It is immaterial who the surety may be. He might be Peterson, or any other "good security." For these reasons, we reverse the judgment, and award a new trial.

Judgment reversed.

JOSEPH B. JONES, and others, Executors of HENRY P. JONES, plaintiffs in error, vs. JOHN T. SHEWMAKER, and wife, defendants in error.

[1.] Until the adoption of the Code, lands acquired after the making of a will, did not pass by the will, which operated only upon such real estate as the Testator owned at the time of executing and publishing his will.

[2.] *Prima facie*, the execution of a codicil to a will of lands, so executed itself as to be capable within the statute of passing lands, is a republication of the original will, and the effect of such republication is, to make the will operate in the same manner as if executed at the time of such republication, unless a special intent is manifest in the codicil to restrain such operation, and give it a less extensive effect. In other words, it brings down the will to the date of the codicil, making the will speak as if of that date. That is, both will and codicil should be taken as one entire instrument.

In Equity. In Burke Superior Court. Bill, etc. Tried before Judge Hook. May Term, 1866..

This cause involved, besides other things, certain lands in the county of Emanuel, of which Henry P. Jones died seized, and which were acquired by him between the time of executing his will and the time of executing the codicil thereto.

His will bore date March 28, 1850, and consisted of twenty-two items, the tenth of which was as follows :

"I further desire and direct that all the land which I may own at my death in the county of Emanuel, in said State, shall be divided into four parts, or shares, as nearly equal in quantity as may be, and equalized in value in the manner specified in item ninth for the shares in Burke county : One of said shares in Emanuel county I give to each of my sons William B. Jones, Henry W. Jones, and James V. Jones, for and during the period of their respective natural lives only, subject to the same limitations and remainders as are mentioned in item fourth. The remaining fourth share, I give to my son Joseph B. Jones, and his heirs forever."

The codicil bore date September 27, 1853. It described the will, giving the time and place of making it, and the names of the attesting witnesses. It then went on, in three

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items, to make changes in the eleventh, twelfth, thirteenth, fourteenth and fifteenth items of the will. A part of the fourth and last item of the codicil was as follows:

"It being my purpose, in the foregoing bequests to said daughters and granddaughter, to equalize their real estate herein given them, I direct that the land remaining after making up the last share devised to my said granddaughter, Josephine V. Brazeal, and not herein devised in that portion of my said last will and testament preceding the fourteenth and fifteenth items, shall be sold, and the proceeds thereof, or so much as may be necessary, be divided amongst my said daughters and granddaughter, to equalize their real estate with the real estate given to my sons: That is, if the shares of said daughters and granddaughter are not already respectively equal to the shares of my sons; and if said proceeds shall be more than enough for this purpose, the excess shall be equally divided amongst my children and granddaughter; but if not sufficient, I make no other distribution for that purpose."

The Court charged the jury as follows: "The other point made by the bill is, that there were lands purchased after the will of testator was executed, and do not pass under that will, but do pass under the codicil which was subsequently made. It is now the law of Georgia, under our Code, that all property acquired subsequent to the making of the will, shall pass under it, if its provisions be sufficiently broad to cover it. But this was not so at the time this will was made, as to real estate: and it is my opinion that it (the real estate in this issue) falls under the operation of, and is to be controlled by the codicil."

The jury decreed accordingly: and the charge of the Court is assigned as error.

STARNES, for plaintiffs in error.

SHEWMAKE, for defendants.

LUMPKIN, C. J.

We fully appreciate the reasoning of Judge STARNES against the rule in England, originating, no doubt, as he very properly contends, in Feudal policy, to-wit: That real estate passes by the will of the testator, which he owned at the time of its execution, upon the notion that a devise affecting lands is merely a species of conveyance. Hence the distinction between devises and testaments of personal chattels. The latter will operate upon whatever the testator dies possessed of; the former only upon such real estate as was his at the time of executing and publishing his will. Wherefore, the rule that no after-purchased lands will pass under such devise, unless subsequent to the purchase or contract, the devisor republishes his will.

The following note is appended by Mr. Justice Coleridge, in his edition of Blackstone: "It was long a prevailing opinion that, if a man devised particular lands by name, which he had not at the time, but afterwards purchased, or devised all lands which he should die seized of, that such devises would be valid. And it is curious that Chief Justice Saunders, a consummate lawyer, under this impression, devised all lands which he had, or afterwards should have in Fullham. His executors were Holt and Pollexfen, Chief Justices, and Sergeant Maynard, who differed as to the validity of the devise, the Sergeant holding the opinion which is now established, and the two Chief Justices that which has been determined not to be law. *Lawrence vs. Dodwell*, 1 *Lord Raym.* 438. Holt, however, lived to change his opinion; and the law is now settled as laid down in the text."

The Statute, 1 *Vict. c. 26*, abolished this distinction between real and personal estate, and enacted that all property, of whatever kind, of which a man is possessed or entitled *at the time of his death*, passes by his will; as the instrument now, with reference to the real and personal estate comprised in it, speaks and takes effect as if executed

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immediately before the testator's death, unless a contrary intention appears by the document itself.

It seems, therefore, that the British Parliament, including the House of Lords, disregarding the rights of primogeniture, were in advance of our own State in changing the law upon this subject, other considerations prompting them to make this change.

It is needless to remark, that, until the adoption of the Code, this Court did not feel itself authorized to change so important a rule of the well-established law ; and, therefore, uniformly held that after acquired lands would not pass by a will previously made by the testator. It is now the law of Georgia, under the Code, that all property acquired subsequent to the making of the will, shall pass under it, if its provisions be sufficiently broad to cover it. But this provision was not in operation at the time this will was made, and hence it does not fall under its operation.

Secondly, plaintiffs in error insist, however, that if they be wrong in the above position, they are right in holding that the execution of the codicil by Henry P. Jones was a republication of the will, and thereby all lands purchased by him in the county of Emanuel, after the execution of the will, and before the codicil, passed by the will. That such is the law, unless there is something in the codicil which expressly contravenes these provisions of the will ; that when a man republishes his will, the effect is that the terms and words of the will should be construed to speak with regard to the property he is seized of at the date of the republication, just the same as if he had such additional property at the time of making his will.

To the contrary, the Court below held, that the lands bought by the testator after the making of the will, and before the execution of the codicil, passed under the codicil, and are to be controlled by it.

We extract from the case of *Haven vs. Foster* 14 Mass. Rep. 534, the rule now settled by the authorities upon this subject, namely : "That *prima facie* the execution of a cod-

icil to a will of lands, so executed itself as to be capable, within the statute, of passing lands, is a republication of such original will; and that this is more especially and unequivocally the case where the codicil contains words declaring and confirming the original will to be in force, either in whole, or so far as it is not altered or revoked by the codicil itself; that the effect of such republication is to make the will operate in the same manner as if executed "at the time of such republication, unless a special intent is manifest in the codicil to restrain such operation and give it a less extensive effect; and that where the will contains a residuary clause or words of general description sufficient to embrace all or any particular description of real estate, of which the deviser is seized, the effect of such republication is to make the will take effect and operate upon and pass any real estate falling within such description, which may have been purchased by the testator, after the date of the will and before the re-publication, unless there is a manifest intent, expressed in the codicil itself, to confine the operation of the will thus republished to the same estate which the testator held, and upon which the will operated at the period of its first execution."

It only remains to apply these rules to the case under consideration. This will bears date March 28th, 1850, and consists of twenty-two items, the tenth of which is as follows:

"I further desire and direct that all the lands which I may own at my death, in the county of Emanuel, in said State, shall be divided into four parts, or shares, as nearly equal in quantity as may be, and equalized in value in the same manner specified in item 9th for the shares in Burke county. One of said shares in Emanuel county I give to each of my sons, Wm. B. Jones, Henry W. Jones and James V. Jones, for and during the period of their respective natural lives only, subject to the same limitations and remainders as are mentioned in item 4th. The remaining four shares I give to my son Joseph B. Jones and his heirs forever."

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The codicil bore date September 27th, 1853, giving the time and place of making it, and the names of the attesting witnesses. It then went on, in three items, to make changes in the 11th, 12th, 13th, 14th and 15th items of the will. A part of the 4th and last item of the codicil was as follows:

"It being my purpose, in the foregoing bequest to said daughters and granddaughter, to equalize their real estate herein given them, I direct that the land remaining after making up the last share devised to my said granddaughter, Josephine V. Brazeal, and not herein devised in that portion of my last will and testament preceding the 14th and 15th items, shall be sold, and the proceeds thereof, or so much as may be necessary, be divided amongst my said daughters and granddaughter, to equalize their real estate with the real estate given to my sons; and if said proceeds shall be more than enough for this purpose, the excess shall be equally divided amongst my children and granddaughter; but if not sufficient, I make no other distribution for that purpose."

Is there anything in this codicil which expressly contravenes the provisions of the will? We think not; and, such being the case, the effect of the re-publication of the codicil is to bring down the will to the date of the codicil, and to make both will and codicil speak as of the date of the latter. In other words, as though both were one entire instrument. Consequently, we reverse the judgment of the Court below.

Judgment reversed.

RICHARD B. COVINGTON, plaintiff in error, vs. COTHRANS & ELLIOTT, defendants in error.

An attachment issued on the 8d of April, 1866, returnable to the *Superior* Court, is amendable by inserting the word "*County*" instead of "*Superior*."

Certiorari. In Floyd Superior Court. Decided by Judge **FEATHERSTON.** July Term, 1866.

On the third of April, 1866, an attachment for a debt of twelve hundred dollars, was issued by a Justice of the Peace, at the instance of the defendants in error, against the plaintiff in error, and made returnable to the *Inferior Court*, May Term, 1866. At said Term of the *County Court*, the defendant in attachment moved to dismiss it, on the ground that after the 17th day of March, 1866, the *Inferior Court* had no jurisdiction of such a case.

The *County Court* so ruled, and passed an order dismissing the attachment.

Upon *Certiorari*, the *Superior Court* reversed said order, and directed the cause to be reinstated.

This is now complained of as error.

ALEXANDER, for plaintiff in error.

UNDERWOOD & SMITH, for defendants.

WALKER, J.

We find no error in this record. The Justice was by law authorized to issue the attachment; in this, he was acting as a ministerial officer, and the mistake in the name of the Court to which he made the attachment returnable, was amendable. The *County Court* was substituted for the *Inferior Court*; the powers of the latter transferred to the former; and the semi-annual terms of the *County Court* held at the same times as the *Inferior Court* had been. The defendant was not ignorant of the Court to which the process was returned, for he appeared at the proper term, and objected to the proceedings, because a single word "*Inferior*" had been used by the mistake of a ministerial officer for the word "*County*." The time for such trifling is past.

This case is unlike the case of *Gresham vs. DeLauny*, de-

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cided, at the last June Term of this Court, for the reason that in the case at bar the officer had authority to issue the process, while in the case at last term the authority had been expressly taken away from him. It was insisted in the argument that the case of *Aycock vs. Aven*, 25 Ga. R. 694, controls this case. We prefer to place our decision on the ground already stated. We think we see reasons which, perhaps, might make an essential difference between the cases, as well as between *Gresham vs. DeLauny*, and *Aycock vs. Aven*.

Judgment affirmed.

CARTER HEARD, (a person of color) plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

The verdict in this case was not contrary to evidence. The killing was murder, not manslaughter.

Murder. In Fulton Superior Court. Tried before Judge WARNER. July Special Term, 1866.

After a verdict against him for murder, the plaintiff in error, by his counsel, moved the Court for a new trial, on the ground that the jury found contrary to evidence and to the weight of the evidence.

The Court refused a new trial, and that is alleged as error.

GARTRELL & HILL, and HOPKINS, for plaintiff in error.

HULSEY, Solicitor General, for the State.

LUMPKIN, C. J.

The following is the evidence given in on the trial :

Wm. Lecroy, sworn—Witness lives near Peachtree street, on an alley 6 or 8 feet wide, fronting Judge W. P. Hammond's back yard. Witness' door fronts on the alley. Sitting in witness' door, witness can see in Hammond's yard—can see it better standing. Hammond's house is two stories. Parties come from second story to yard by stairs in back of house. House has one door and one window down stairs, and up-stairs witness thinks it has two windows. The kitchen is some 5 to 10 steps from back part of the house. W. P. Hammond lives in the house. Did not know Joseph Bird Hammond, has seen him. Witness heard some fuss about 8 o'clock last Saturday night soon after laying down. Witness went to bed early. The first witness heard was something like a lady crying. There was a window near the head of witness' bed. The noise seemed to be between the kitchen and well. Well is between kitchen and house. Saw deceased going toward the door of the dwelling house. Young Hammond went into the house—remained on the first floor. Witness supposes that it was 20 minutes before the fatal difficulty. The negro staid in the yard talking to Hammond until deceased came out in direction of negro boy, and he (negro) ran out the back way. Negro came through the alley—came back in a short time to the house where his mother had been cooking for Mr. Hammond—asked his mother for his knife, saying, mammy, give me my knife; I want my knife. He did not get the knife at that window then. The negro left the window in the alley. Negro was not in the yard. Prisoner went out of the alley around the fence which went around the house. After his mother made him some answer, went to the left behind the chimney of the cook house. Witness is not positive. Prisoner's mother came out and went up the alley by where prisoner stood asking for his knife. In a short time his mother came back in the same way. In a short time the boy came back with a knife in his hand. Witness was very near prisoner; prisoner nearly rubbed him. Could see the knife plainly. It was a moonlight night—the moon

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shining tolerably bright. No light in witness' house; light up-stairs in Hammond's house; thinks there was none in first story.

Just as prisoner turned out of alley into the gate, he said, damn him, I'll fix him now. This called witness' attention to knife. Had his right side towards witness; held knife in his right hand; it was long, reaching nearly to his elbow; sleeves slightly rolled up. Witness saw the knife very plain. After prisoner went through the gate, he said, damn him, I'll kill him now, if he fools with me any more. Deceased was up-stairs at the window. Prisoner went to the cook house and either sat on or leaned against a table there; still kept talking; witness supposed he was talking to his mother. Talked some 4 minutes, and deceased came to the window. Deceased said he (prisoner) must either go out of that yard or hush such a fuss. Prisoner replied to deceased that he should neither leave nor hush, and said if he (deceased) came down there he would take his damn life. Deceased said he did not want to come down, or have any more difficulty with him, but would have it to do if he did not keep less fuss. He repeated the remark he (prisoner) made before, about taking his damn life, and dared him to come. Deceased said, you do, eh? Prisoner replied, yes, I do; and deceased started to come down. There were some ladies above, who seemed to try to stop him and hinder him (deceased) from coming. They came to the window and told the prisoner to run away—to leave there quick—and about that time deceased came out of the door below into the yard. Witness could see him plain. It was dark from door to well. Where moon was shining, could see the bulk of deceased—hands and legs. Didn't see him have anything. Deceased went in direction of cook house, and met prisoner's mother. She raised her hands, as if she caught deceased; backed for a step or two, to the best of witness' knowledge. She had hold of him. Saw prisoner's hand and arm raised, and he made toward deceased. Prisoner's mother, when she caught deceased, was saying, "Oh, Lord! Oh, Lord! don't hit him

with that stick." Don't know to whom she was talking—saw no stick. It was at the same time the prisoner was coming. As prisoner came up his hand dropped down, and he stopped for a moment, and then passed up by the corner of the dwelling house. Deceased started towards the house, and just as he went in the door the prisoner came out the gate and ran down the alley towards Peachtree street. The ladies soon commenced screaming, crying and hallooing. When prisoner raised his hand he was 3 or 4 steps from deceased—raised it as he left the table, and his hand came down when he was right at deceased. Prisoner did not go back to deceased; passed him very close as he was going in the door. Witness saw nothing like a stick, except the raising and dropping of the arm. The only time witness is positive he saw a knife was when prisoner went in the gate. Witness put on his clothes, went around on Peachtree street, and went in the house—went in front door and up-stairs where deceased was. Deceased only breathed a time or two after witness reached him, as well as witness could discover. Saw a man, who witness supposed was a physician, open deceased's breast; saw a cut above right nipple; he put his two fingers in it. Deceased's clothing was bloody; the floor also. He was up-stairs. Witness supposes it occurred in this county; he has not lived here long; it was in this town. Deceased was pronounced dead before witness left. Witness saw no one in the yard at the time but deceased, prisoner, and prisoner's mother.

Cross-Examined.—The alley was something from five to ten feet. Witness' house is but a few steps from Hammond's, will not exceed ten steps from witness' room to place where deceased was killed. Well is between cook house and dwelling—is a step or two from cook-house, probably a little more or less; cook-house is about same distance from witness' house as from Hammond's. When prisoner went out he was absent several minutes; came back to window and asked for his knife; blade was as wide as two fingers, about $1\frac{1}{2}$ inches; about 12 or 14 inches long; extended up his arm about his

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elbow, above it, if anything—fully to the elbow. Was moving knife in his hand. Said if he (deceased) fooled with him, or came in his way, he would kill him. The table was very near the cook-house. Prisoner was talking at table about 4 minutes before deceased came to window. Heard deceased's sisters saying, oh! Bud, don't go. Thinks they were not the voices he heard first. Deceased did not stop when he came out of the house until he met prisoner's mother. Saw no weapon in deceased's hand; he was swinging his hands. The prisoner's mother threw her hands against deceased's breast, and kept them there as though she had hold of deceased.

From where witness saw prisoner's hand come down, to back door of Hammond's house, is 2 or 3 steps. When his (prisoner's) hand came down, his left side was towards witness. Prisoner raised his hand above his head, and it came down quick. Did not see the knife except when prisoner went in the gate. Witness was further off from prisoner when his hand came down than when he went in the gate. He was beyond the cook-house when prisoner's mother raised her hands. She pitched at deceased quick, as though to stop him. It was not as dark where she put her hands on deceased as where he came out the door.

Re-Examined by State.—The first noise of female voices witness heard were at the cook-house. The door where deceased had to go in to go up stairs was at the corner of the house. A person could reach from corner to house.

M. Lamb, sworn.—Witness lives next door to Mr. LeCroy. There is a store in front, fronting on Peachtree street. There is no opening in the store on the alley. Don't know whether there is a window or not. There is a door and window that open on the alley from LeCroy's, and the same from witness' house. It is about 10 feet from LeCroy's door to witness'. LeCroy's window is between the two doors. It is 8 feet from LeCroy's door to Hammond's gate. Witness measured it to-day. It is about 8 feet from witness' door to Hammond's gate. The gate was at an angle and

farther. LeCroy's door and the gate are exactly opposite. Witness' window is near the centre behind Hammond's kitchen. Witness can see Hammond's gate from his window; can see the well from his door. There is a low plank fence behind the kitchen; about waist high. It is four feet from corner of house to well. The door of the kitchen is on the upper side. It is 10 feet from well to kitchen door, and same to Hammond's door. It is 10 steps across the yard. Witness was living at the place last Saturday night. Witness was standing in his door, and prisoner came by witness' door going towards Peachtree street. Witness discovered prisoner had a knife in his hand, and said d—n him, I'll fix him now; ran by witness and nearly brushed against him. Witness' wife and boy were in the door with him when prisoner went in gate. His right side was towards witness; and prisoner said, I'll kill him. The knife was about 12 or 14 inches long. He went up the yard, around the corner of the kitchen, out of sight of witness. Witness could hear him; he said, d—n him, I'll kill him. He dared somebody to come down there and he would take his life. Heard the young man tell him to go out of the yard or hush his fuss. He said he would not go out of the yard or hush either.

Prisoner again dared the young man to come down; if he did d—n him he'd kill him. Deceased said, you do, eh? The prisoner said, I do. The young man started from the up-stairs door, and witness heard some lady tell him to stop, not to go down there. He came down and out of the door, and got about half way between the house and kitchen on the upper side of the well. The woman met him and threw her hands on him. Prisoner was about a step or two behind deceased, between deceased and the house. He raised his hand and struck down. Didn't see him (prisoner) strike but one lick. Prisoner stopped about a moment, and deceased started in the house. Prisoner went towards the upper corner of the house. When deceased stopped on the door, prisoner ran by him out the gate. There is no more

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than 3 or 4 feet between Hammond's and the next house.

When the woman caught deceased, she said, "dont hit him with that stick." Could see deceased tolerably plain when he came out the door, as plain as a man could be seen in the shade of a house when the moon was shining. Deceased was swinging his hands just as a man would in walking. Did not see him have any stick. Saw deceased afterwards in the house, after he was dead. Saw no wounds. His shirt was bloody. It was between eight and nine o'clock. When the woman caught deceased he was in the edge of the moonshine. The woman went back towards the kitchen out of sight, when the prisoner went out the gate.

W. J. Lamb, sworn.—Witness was on the alley near Hammond's house, in Meredy Lamb's house, last Saturday. Witness was eating supper near the window. Heard somebody quarrelling in the alley, cursing, and saw prisoner pass by the window going from the street. He passed out the east end of the alley. He had his collar rolled down and his sleeves rolled up near the elbow. He was going towards the kitchen window at the end of the alley. Heard him say, 'Mammy, give me my knife; I'll kill him if he jaws me or says much to me. He went on round the end of the kitchen, away from the street, by the fence; thought he picked up some bricks. Medith Lamb was not at the house; he (M. Lamb) did not come while witness was there. Witness went away; was gone about 15 or 20 minutes. Heard some one screaming and went back. When witness came back, he saw a crowd around prisoner, and witness helped to arrest him. He got away once and was re-arrested.

Cross Examined.—Went to the auction house—don't know whose—where Tom Kyle used to keep store, corner Peachtree and Marietta streets. There was a crowd around prisoner; heard no threats against his life then.

Dr. D. H. Connally, sworn.—Witness knows where W. P. Hammond lives; it is on Peachtree street, in Fulton county. Witness thinks the lower part is occupied as a grocery store,

the upper part as a dwelling; was there Saturday night. Witness was passing near there, heard some one screaming, was met by some one, and asked me to come immediately with him to see a man who had been stabbed. Witness walked from Pryor street in the rear of Hammond's, passed through the lot to the back door and around and up the steps in back room of lower floor. When witness got to the top of the steps, he saw deceased dead; he was lying with his face up, a pillow under his head. Witness made an examination—on his right breast witness discovered a wound to the upper and outer portion of the right breast under the collar bone. Witness had no instruments and introduced his finger into the wound, found the second rib had been entirely severed; failed to reach the bottom of the wound; supposed the wound to be 4 or 5 inches in depth; could not ascertain whether the artery and vein were cut, but supposed so, from the quality and quantity of blood; the character of the blood was light colored, like blood from an artery; it had coagulated; it was not likely that so much blood would come from a vein; the wound must have been made by a cut down; it was about $1\frac{1}{2}$ or $1\frac{3}{4}$ inches wide; it was a punctured wound, smooth; must have been done with a knife; it was a fatal wound. Witness made a slight examination in passage, asked Mr. Hammond for a room, carried deceased there, and made the examination; did not examine any other part of deceased's body; the wound passed into the upper lobe of the right lung.

Mary Hammond sworn.—Witness is a daughter of W. P. Hammond, is a sister of the deceased. Witness was living with the family. Witness saw prisoner come into the yard, could not hear what he said. Witness and deceased were sitting up stairs; they went to the window, and prisoner dared deceased down three times, and deceased said he could not take the dare. Witness told prisoner 3 times to go away; deceased started down stairs; he carried nothing with him. Witness went back to the door and saw prisoner meet deceased and hit him; prisoner had been sitting on a table, and when deceased came out of the door, prisoner and his moth-

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er came towards him ; prisoner's mother caught hold of deceased, and prisoner struck him. Witness started down stairs and deceased went past her up stairs and fell dead. Neither party had any stick that witness saw ; witness could see them, but they were all close together. Witness' father slept in the back room of the store ; had gone to bed ; called him twice before he got up.

Cross Examined.—Was there all that evening. Witness' sister, Mrs. Hargroves, was there. Witness does not know how the fuss commenced, did not see deceased throw water on prisoner or strike him ; knows nothing that occurred previous ; there were four rooms between witness and the kitchen. Witness was sitting in the back room, when she heard the negro talking and daring ; prisoner was sitting on a table, near the kitchen door ; deceased, after the second dare, told the prisoner to leave the yard ; deceased was sitting by the fire place, and went to the door after the second dare ; had been sitting by the fire place about 15 or 20 minutes ; deceased had not been down in that time. The window is on the corner and the door at the other corner, and the chimney, between, at the end of the house. The window was toward the gate, from where deceased sat, the door in the other direction.

There was no stick with iron for digging in the yard, as far as witness knows ; they met deceased about 3 or 4 feet from the door ; prisoner before, about two steps ; saw no stick ; they both started at him ; thinks the woman got to deceased before prisoner struck ; she stepped around deceased and was between deceased and the house ; they stepped farther from the door ; deceased came running up the steps by witness. Did not hear the woman say anything about a stick ; heard her say don't kill him ; don't know to what she alluded ; it was just as deceased and prisoner got together.

Re-examined by State.—Prisoner and his mother were hired by witness' father.

Hugh Tomlinson.—Witness found a wound on right breast of deceased, and one large place on the left side under the

shoulder blade, and one smaller one under it; the wound seemed to be cut across; the length ran across the body; the smaller one was a little further back, near the spine. Witness remained until after the burial. There was no inquest. Could not tell how deep the wound was. The body was dressed a little after 12 o'clock.

The State having closed, the defendant offered in evidence the following testimony :

Elvira Heard, sworn.—Prisoner is witness' son. Witness was sitting in the kitchen and heard prisoner say, quit that, Bud. Witness went to the door and saw Bud walk in the door with another pan of water and toss it on prisoner; deceased then came and tossed out another pan of water, and defendant lay there and said nothing. Witness went back and heard Bud coming and told prisoner Bud was coming. Deceased came up to the table where prisoner was laying; took hold of him by the neck and says, are you mad? Deceased said, did you draw this (meaning a piece of brick or chip lying on the table) on me. Prisoner said no, sir, Deceased caught up a spade and said, d—n you, I believe you did have that drawn on me, Witness held on to the spade and hollowed for Miss Mary. Miss Hargroves said, Mary, there is Bud down there fighting Carter for nothing. Miss Mary came down, and deceased met them in the door and went up stairs. Prisoner went off—said he was going after a policeman—said deceased struck him for nothing—began for nothing. Prisoner went off; staid awhile and came back; got on the table and commenced talking to Bud, some very insulting words. Deceased said if you don't hush I'll come down there and get hold of you again; go out of this yard; prisoner said he would not go out of the yard until he got ready. Deceased said if you don't go out of the yard I'll make you go out. Deceased came running down stairs—picked up a digging spade in his hand, and came running to prisoner. Witness stepped between them, put her left hand on deceased, and right hand on prisoner, and said, Lord, Bud, don't hit him with that stick, please. Witness stepped back to the

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gate—screamed with all her might. The spade was a straight digger, like a crow-bar; wood, with iron on the end; the handle was about twice as long as an ax handle—the iron was flat at the end to dig holes; the stick was about as long as a chair-post. Witness was about two steps from the table when deceased came. From the time of the throwing of water to the time they came together was about a half hour.

Cross-Examined.—After the fuss witness went out to a neighbors and lay down; then came back to her own house and staid there until arrested. Witness and prisoner have been in jail together ever since; have been here together, and heard all the witnesses. Witness' back was towards the alley when they came together; don't know how often prisoner cut deceased. Prisoner was not gone more than a quarter of an hour when he went away. First witness knew of his coming back, heard deceased ask him if he had the policeman. Witness staid in the kitchen and did not go out of the yard until after the cutting. Don't know what the prisoner did with the knife after the cutting. Witness took the spade from deceased, dropped it on the ground, and called for Miss Mary.

There is a piazza in front of the house. Thinks a person could have heard her call from where she was to the front of house.

Was the verdict of the jury contrary to the evidence? The prisoner does not complain that he did not have a fair and impartial trial; but that he ought not to have been found guilty of murder upon the testimony.

What is there in the evidence to mitigate the offence from murder to manslaughter? Was there any actual assault upon the defendant? Did Hammond make any attempt to commit serious personal injury on Heard? Taking the testimony of the mother of the prisoner as true, Hammond's conduct seems to have been sportive in the outset of the difficulty, and throughout he indicated an intention to avoid any altercation. On the other hand, the conduct of Heard

shows bad feeling, and a disposition to provoke a conflict. He deliberately prepared a most deadly weapon, and this too when he had ample time, not only to deliberate, but to keep out of the way. So far from pursuing this course, he returns, bent on mischief if an opportunity occurred. He threatens and dares Hammond to come down. Hammond at first declines, and orders him to leave the lot. Heard not only refuses, but replies insultingly to him. Finally, Hammond goes to where Heard is. As they approached, the mother of Heard testifies that Hammond caught up a spade; she importunes him not to strike her son, and she does not pretend that he offered to use the digger. Other witnesses, who had ample opportunity of seeing, testify that they saw nothing in Hammond's hand. Then Heard, with his knife of formidable dimensions, struck the fatal blows which terminated the deceased's life.

I will not say that Heard evinced a murderous spirit, but certainly a very bad temper throughout this altercation; looking forward to the opportunity, if not inviting it, when he might take Hammond's life.

All the evidence shows a vicious and depraved propensity to take human life, for the preservation of which laws are enacted.

In this age of recklessness and terrible demoralization, if men sow to the wind, they cannot expect Courts and juries to interpose and prevent them from reaping the whirlwind. They must eat of the fruit of their own doings. It has been said heretofore, that few cases of murder in the first degree, such as poisoning and private assassination, were committed by our people. But if passion, without sufficient provocation, is to excuse men from the crime and guilt of murder, then is human life cheap indeed—of no more value than the sparrow's.

I have lost faith very much in punishment, as a means of amending the offender himself. Its reformatory effect is not much, I fear; still, its punitive power must be felt; and while the glittering blade, wielded by the strong arm of malice is

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mighty to destroy, still, the small cord, in the hands of the executioner of justice, must be felt to be not less fatal and unerring.

This is an age of Cains, and the voices of murdered Abels come up at every Court, crying aloud to the ministers of the law for vengeance. Let the stern response going out from the jury box and the bench be, whoso sheddeth man's blood without legal excuse or justification, shall be hung by the neck till he is dead.

Judgment affirmed.

JAMES W. STINSON, plaintiff in error, vs. STEPHEN WILLIAMS,
defendant in error.

When a judgment creditor has pursued his legal remedies to every available extent without success, he may go into a Court of Equity to reach the equitable assets of his debtor, not the subject matter of levy and sale.

In Equity. In Meriwether Superior Court. Motion to dismiss Bill. Decided by Judge WARNER. August Term, 1866.

Upon certain bills issued by the Chattahoochee Railroad & Banking Company, (a corporation which enjoyed and exercised banking privileges,) the defendant in error recovered a judgment against said corporation on the 20th of April, 1842. On the 2d of July, 1842, the *fi fa* issued upon said judgment was returned *nulla bona*, the corporation having become totally insolvent. This debt remains unpaid.

By a subscription for stock, or otherwise, the plaintiff in error, on the 17th of August, 1838, became indebted to said corporation, and by covenant in writing, under seal, under-

took to pay his said indebtedness by the 1st of December, 1848; and at the same time and in the same covenant, (to secure the payment of such indebtedness for the benefit of the creditors of the corporation,) he executed to the corporation his mortgage deed upon certain lands.

In July, 1861, the defendant in error filed his bill against the plaintiff in error, alleging the foregoing facts; specifying amounts, &c., with proper certainty, and exhibiting a copy of the said covenant and mortgage deed.

The bill alleged, further, that, during the existence of the corporation, its members failed to collect said debt of Stinson, the plaintiff in error, and that, since its dissolution, the assignees of the corporation have also failed so to do, or to take any steps therefor, or for the foreclosure of the mortgage. Also, that, without the interference of a Court of Equity, the said debt from Stinson to the corporation would go unpaid, and the complainant would lose the debt due to him from the corporation.

The bill prayed for general relief, and specifically that Stinson, the plaintiff in error, be decreed to pay off his indebtedness on the covenant and mortgage aforesaid, and that the same, or so much thereof as is necessary, be applied to the satisfaction of the complainant's demand.

At August Term, 1866, counsel for Stinson moved to dismiss the bill for want of equity, for general vagueness in the allegations, and for want of proper parties.

The Court overruled the motion, and this is assigned as error.

BIGHAM, represented by PEEPLES, for plaintiff in error.

DOUGHERTY, for defendant.

WALKER, J.

In this case, we adopt as our own the opinion of Judge

Warner. After stating the principal allegations of the bill, he says:

"The complainant, it will be observed, is a bill holder of said corporation, and his claim is predicated upon *that fact*.

By the 27th section of the amended Charter, (*Prin. Dig.* 367) incorporating said company, it is expressly declared that 'the said Railroad, and every part of it, and all materials purchased for its construction, and all the locomotives of said company, and every species of property owned by the company, shall be pledged, in the first place, for the payment of their banking operations, and one-half of the capital set aside for banking purposes.' The defendant's covenant and mortgage to the company constitute one 'species of property owned by the company;' it is a *debt* due by him to the company, out of which the complainant, as a bill holder, according to the charter, is entitled to be paid. In my judgment, the complainant has alleged such facts, when taken in connection with the act of incorporation, (a public law, of which the Court is bound to take notice,) as will entitle him to relief in a Court of Equity. The main facts which entitle him to relief are *issuable facts*. When a judgment creditor seeks the aid of a Court of Equity, to reach the equitable assets of his debtor, not the subject matter of levy and sale, he must show that he has pursued his legal remedies to every available extent. *Stephens vs. Bell*, 4 Ga. R. 319. The complainant has brought himself within that rule. The *debt* owing by the defendant to the corporation cannot be reached by the ordinary process of levy and sale. It is not apparent on the face of the bill that there are other parties necessary to enable the Court to make a decree. As a matter of course, all proper and necessary parties ought to be before the Court when a final decree is made. The complainant may sue on behalf of himself and such other creditors as may choose to come in under the decree, if, indeed, there be any others. But, up to the time of the decree, it is only a suit between party and party, and the plaintiff is master of his own case. *McDougald vs. Dougherty*, 11 Ga. R.

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588. Assuming, as the motion to dismiss the bill does, that all the allegations contained therein are true, as therein set forth, the motion to dismiss the same is refused.

HIRAM WARNER, J. S. C. C. C."

We deem it unnecessary to add anything to this clear exposition of the law of the case. For the reasons given by Judge Warner, we affirm the judgment.

Judgment affirmed.

M. H. VANDYKE, BENJAMIN HAMILTON, and THE YAHOOOLA RIVER AND CANE CREEK HYDRAULIC HOSE MINING COMPANY, plaintiffs in error, vs. CHARLES A. BESSER, defendant in error.

[1.] A judgment may be set aside on account of the uncertainty of the pleadings.

[2.] It may also be vacated when founded on an award, where the submission is illegal, the defendant in the judgment not having been a party to the arbitration.

Motion to set aside Judgment. In Lumpkin Superior Court. Decided by Judge LEWIN. August Term, 1866.

To July Term, 1861, of Lumpkin Superior Court, Besser brought an action of assumpsit upon an account for \$732.04. The defendants thereto, as described in the declaration, were "Dr. M. H. VanDyke and Benjamin Hamilton, a body corporate and politic under the name and style of The Yahooola River and Cane Creek Hydraulic Hose Mining Company." A bill of particulars annexed to the declaration was filed thus: "Messrs. Hamilton & VanDyke, Dr., for Ya- To C. A. Besser." The process issued by the Clerk in the case in the margin thus: "Charles A. Besser vs. VanDyke, Benjamin Hamilton and the Yahooola and Cane Creek Hydraulic Hose Mining Company,"

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and went on, in the usual form, requiring the "defendants" to appear, etc. The Sheriff's return showed personal service on VanDyke and Hamilton, and service upon the Company by leaving a copy at their office, the place of transacting their usual business, in Dahlonega.

An award followed, rendered by Wier Boyd and A. G. Wimpey. It bears date, as sent up in the record, March 1, 1866; but 1866 was, doubtless, in copying, written by mistake for 1864. The award states the case substantially as it is stated in the Clerk's process, and after reciting that said case was "mutually, verbally, referred for arbitrament and final settlement," proceeds to find in favor of Besser, seven hundred dollars.

This award was made the judgment of the Superior Court, by an order stating the case as the award stated it, and reciting that the same had been referred to Boyd & Wimpey. The order gave leave to sign judgment for the amount specified in the award, and judgment was entered up accordingly by Bessers' counsel, and signed at May Adjourned Term, 1864.

Fi. fa. was issued against all the plaintiffs in error, and was afterwards levied upon the property of the Company. VanDyke filed an affidavit of illegality, which the Court dismissed on the ground that the execution was proceeding not against him, but against the Company. That ruling was affirmed by the Supreme Court. (See 34 *Ga. R.* 268.)

In the Superior Court, at August Term, 1866, the plaintiffs in error moved to set aside the original judgment, on various grounds, among them the two following :

1. Because the pleadings are so defective that no legal judgment could be rendered.

2. Because there was no order of Court referring the case to the arbitrators, and the amount in controversy being over five hundred dollars, no verbal reference could be legally made.

Upon this motion the judgment of the Court was as follows: "Ordered that said motion be overruled, and that plaintiff have leave to proceed, upon the ground that it ap-

pears of record that all the defendants were regularly served and appeared by counsel, and failed to plead in abatement, or to file any other plea; *Secondly*, Because the defendants overlooked the defects and irregularities in the pleadings, of which they complain, and took steps in the cause; *Thirdly*, Because the parties all being served and regularly in Court, with a full knowledge of all the proceedings in said cause, submitted the matter in controversy to the arbitrament and award of defendant's counsel and one A. G. Wimpey, and allowed the award to be made the judgment of said Court, thereby waiving all defects, both in the pleadings and the award, the former of which were amendable at any stage of the proceedings."

This decision is now here for review.

BROWN & POPE, for plaintiffs in error.

BELL and LESTER, for defendant.

LUMPKIN, C. J.

That the proceedings in this case are characterized by great uncertainty, is manifest. The plaintiff claimed an open account to be due by somebody, but who the debtor is, is not sure from the declaration or the bill of particulars annexed thereto.

Is it the purpose of the pleader to charge VanDyke and Hamilton individually, and also as corporators? The bill of particulars is equally uncertain. It is against VanDyke and Hamilton for Yahola. Does not this charge the corporation alone, through their agents VanDyke and Hamilton? How can anything certain be educed from such defective pleadings?

Well, it is said that the matters in controversy were referred to arbitrators, and that the reference admits the sufficiency and regularity of the pleadings. VanDyke protests that he was no party to this reference, and that nothing can

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be infered against him. He further contends, it was an illegal submission, being verbal only, and the matter in controversy being over five hundred dollars; and this is true under Section 2826 of the Code.

The trouble all the way through this case seems to grow out of the confusion and uncertainty of the record. Parties are called parties, instead of VanDyke by name, and thus you cannot tell who is meant.

I see but one thing positively certain in this case, and that is, that all the parties litigating were served at the beginning; but what part they have taken in the controversy since, I am unable to tell from the record.

The Judge below assumes certain things to be true; but upon what proof? The record does not sustain him in these assumptions.

Upon the whole, we think the judgment should be vacated, which leaves the declaration in Court notwithstanding; and then, if the plaintiff choses to build upon this foundation, very well; he can do so by filing his writ against his true debtor, unless the parties, in the meantime, should see proper to adjust this matter of account between themselves, through the aid of mutual friends. There is no legal principle, apparently, involved, but simply a matter of account.

Judgment reversed.

S. STRICKER & Co., plaintiffs in error, vs. JOHN F. TINKHAM,
defendant in error.

[1.] A contract made in another State, intended to have effect in this, must conform to the laws of this State.

- [2.] An assignment executed in Tennessee by an insolvent, conveying property in Georgia, and giving a preference to certain creditors, to the exclusion of an *equal* participation by *all* the creditors, is void.
- [3.] We cannot enforce contracts which contravene the policy of our law.
- [4.] A Court of Equity will exercise the power of re-forming instruments with caution, and only when a proper case is made by the pleadings.
- [5.] Courts do not make contracts for parties, but enforce those which are valid, when called on so to do.

In Equity. In Fulton Superior Court. Demurrer. Decided by Judge WARNER. October Term, 1866.

On the 23d of January, 1866, Tinkham, a citizen of Tennessee, being indebted in the sum of \$11,500, and having assets worth from eight to ten thousand dollars, executed an assignment, in that State, to one Horle, in trust for the benefit of his creditors. This assignment embraced all his effects, (except about two hundred dollars worth of furniture,) consisting of a lease upon a store in Atlanta, Georgia, stock of goods in said store, monies, credits, and other personal property, all referred to in the assignment as being in the city of Atlanta. It directed that the assignee should sell the property and effects upon such terms as he should think best, but not on a credit; collect all money and credits, accounts and claims; and when the amount thus realized should, in his judgment, be sufficient to distribute without endangering the interest of any of the creditors, then, first paying the expenses of executing and carrying into effect the assignment, and all rents and taxes due, or to become due, upon the property until sold, to pay, first, the wages of the employees of the store, all borrowed monies, any that might be on deposit, and any confidential debts that Tinkham might owe; then, secondly, to pay out of the residue his other creditors, or, in case of a deficit, to distribute said residue among them *pro rata*; and, lastly, in case of a surplus, to return the same to Tinkham, his executors, administrators, or assigns.

Certain creditors of Tinkham not of the preferred class, all of them non-residents of Georgia, and among them S. Stricker & Co., of Tennessee, sued out attachments against

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him, after being notified of said assignment, and caused them to be levied upon the stock of goods and store specified therein.

Tinkham thereupon filed his bill, alleging the foregoing facts, and also that, with an honest intention to do the very best he could with all his creditors, to treat them all just and equitably, and to turn over to them for their own use and benefit all his property of every kind and description, he executed said assignment, but that it was drawn in Tennessee by a Tennessee lawyer, who did not fully understand the laws of Georgia touching assignments, and it was not drawn in accordance with the laws of this State; also, that the property, if sold out at retail, would bring a large sum; but if sold by the Sheriff, would not bring enough to satisfy even the attaching creditors, and consequently other creditors would be greatly damaged, and he himself ruined.

He prayed for the appointment of a receiver, for an injunction against proceeding with the attachments, for a reformation of the assignment, so as to make it conform to the laws of Georgia, and for full and complete justice to himself and all his creditors.

A receiver was appointed, and, at the appearance term of the bill, Stricker and Co. demurred to it, on several grounds, among them the want of equity in the bill and the invalidity of the assignment.

The Court overruled the demurrer, and this is the judgment brought up for review.

HOPKINS and BLECKLEY, for plaintiffs in error.

SPRAYBERRY and LESTER, for defendant.

WALKER, J.

[1.] It is admitted by counsel for Tinkham that the words of the assignment to Horle would make the instrument obnoxious to the provisions of the *Code, sec. 1954*, if the in-

strument had been executed in Georgia. But it is insisted that the assignment, according to the laws of Tennessee, where it was executed, is legal and valid; and, being valid there, is valid everywhere. We admit the general rule, that the *lex loci* governs in determining upon the validity of a contract, &c., but the rule is not without exception. *Section 9, of the Code*, says: "The validity, form and effects of all writings or contracts are determined by the laws of the place where executed. When such writing or contract is intended to have effect in this State, it must be executed in conformity to the laws of this State."

[2.] This assignment "is intended to have effect in this State," and, to make it valid, it should have been executed in conformity to our laws; and, not having been executed in such terms as to be valid according to our statutes, we hold that it is void.

[3.] We could not enforce a contract, valid where made, if it "is of such a character as contravenes the policy of our law." *Code, sec. 2702. Hershfield vs. Dexter, 12 Ga. R. 586.*

[4.] It was insisted that a Court of Equity will reform an instrument so as to make it conform to the intention of the parties. It is true that, under certain circumstances, equity will reform an instrument, (*Code, sec. 3047*) though this power is exercised with caution; (*sec. 3050*) but it will not do so until a proper case is made by the pleadings. Here Tinkham says "that, with an honest intention to do the very best he could with all his creditors, to treat them all justly and equitably, and to turn over to them, for their own use and benefit, all his property, he executed said assignment," &c. There is no allegation of any mistake made by the draftsman in framing the assignment, nor that the assignor intended that *all* of his creditors should participate *equally* in the property assigned; nor does he allege what he considers just and equitable treatment of his creditors. We are left to presume that he thought certain ones should be preferred, to the partial exclusion of all the others.

Simpson, vs. Robert and wife.

[5.] He prays for a reformation of the assignment, so as to make it conform to the laws of Georgia. In other words, that inasmuch as the assignment which he attempted to make is a mere nullity, he prays that a Court of Equity may make one for him. Courts do not make contracts for parties, but enforce such legal contracts as parties make, when called on so to do. Under any view which we can take of this case, we can see no equity in it, and think the Court should have sustained the demurrer and dismissed the bill.

Judgment reversed.

OLIVE SIMPSON, plaintiff in error, vs. WM. H. ROBERT and wife, defendants in error.

- [1] Although the words "*preceeding*" and "*aforsaid*" mean generally next before, and "*following*" next after, yet a different signification will be given to them if required by the context and the facts of the case.
- [2] A mortgage given by a principal to his bail, to indemnify him against loss on account of his liability in case of forfeiture, is valid.
- [3] The condition of the bail bond, that the principal shall attend at a certain term of the Court, and from term to term thereafter until discharged by leave of the Court, is good.
- [4] The committing magistrate may authorize the Sheriff to imprison the offender until he enters into a recognizance for his appearance to answer for the offence, and his bond taken by the Sheriff, is legal.
- [5] An indigent debtor has no power to encumber his property so as to divert that portion exempt by law for the support of his wife and minor children.

Injunction and Receiver. Decision at Chambers, by Judge CLARK. September 1866.

The defendants in error filed their cross bill of injunction, praying for a Receiver, against the plaintiff in error, alleging that they purchased, at the price of one hundred and fifty dollars, from one Jordan Williford, the growing crop of one Tillman J. Simpson, on 30 acres of land, more or less, consisting of corn, peas and potatoes. The crop was growing

on land rented by Simpson from Irwin. Williford took a written transfer of the crop from Simpson. The consideration was that Williford stood security on the bond of Simpson to appear at Court in July, 1866, in Lee county, to answer the charge of simple larceny. The transfer to be void if Simpson kept the condition of this bond. Simpson did not appear. On the contrary, very soon after the date of the bond he ran away. Defendants in error paid the purchase money by a draft drawn on Hardeman & Sparks, of Macon, in favor of Newson, who is Judge of the County Court of Lee, to be by him paid over to Williford. The draft was promptly accepted and is still in the possession of Newson. Williford, being satisfied, put defendants in error in possession of the premises, to enable them to control the growing crop. The plaintiff in error (wife of Simpson) was apprised of the nature and object of the whole transaction, assented thereto, and only requested to be allowed to continue to occupy the house.

Defendants in error remained in peaceable possession, working and taking care of the crop until about the 25th of August, 1866, when they were served with an injunction, granted by the Judge of the Pataula Circuit, without requiring a bond, and without notice, at the instance of the plaintiff in error, enjoining them against taking possession or in any wise interfering with the crop. Plaintiff in error charged in her bill that the appearance bond of Simpson was void; that she was very poor, and if the crop is taken from her she and her six children will be left destitute.

Defendants in error further charge, that plaintiff in error is wasting the crop, and that she is totally insolvent.

The injunction was granted and a receiver appointed, and this is the error alleged.

FRED. H. WEST, for plaintiff in error.

GEO. KIMBROUGH, for defendant in error.

Simpson vs. Roberts and wife.

LUMPKIN, C. J.

This case originated in this wise: Tillman J. Simpson was arrested for simple larceny, in Lee county, and committed to Dougherty county jail, on account of the insufficiency of Lee county jail. Jordan Williford became his bail, and for this purpose entered into a recognizance to the Sheriff of the county that he would appear at the semi-annual session of the County Court, to be held on the 4th Monday in July, 1866, and from Term to Term, to abide by whatever was adjudged against him, until discharged by the Court.

To induce Williford to become his bail, he executed a mortgage to Williford on his growing crop. This instrument was transferred to Roberts and wife. Mrs. Simpson filed a bill of injunction to stop the parties from any interference with her property under this contract. Roberts and wife filed a cross bill, praying the appointment of a receiver to take charge of the property until the litigation should be settled, and it is to this action of the Court that exceptions are taken.

It is insisted that the foundation of this proceeding is illegal and void, and that consequently the whole superstructure erected upon it must fall to the ground. It is contended that the bail bond is void for several reasons: 1st, That the Sheriff, as such, had no right to take it, the obligor being in the custody of the law, where he had been confined by the proper authority. 2. The offence charged was simple larceny, the committing magistrate might, if he thought proper, direct him to be kept in jail for safe-keeping, until he could give bail. We see no objection to such a proceeding. 3. Again, it is said, that the bond imposes a condition not required by law, and therefore it is void. We do not appreciate this objection. He is required to appear from Term to Term till discharged by the Court from the offence. Wherein can it be said to be more onerous than if he was bound to appear at the next Term and not to depart the Court until authorized to do so?

There is a little confusion in the wording of the bond, arising from the fact that the prisoner was committed to the jail in Dougherty county, owing to the insufficiency of the jail in Lee county, and the word "*said*" grammatically applies to Dougherty instead of Lee county. But this is explained by the facts of the case, and the context.—*Code*, Sec. 6, *Par.* 11.

It is alleged that the mortgage lien, given by Simpson to Williford, is void, and could vest no title in the latter which he could transfer to Roberts and wife; and this because it is contrary to public policy, to allow a party to substitute a property security to enable him to escape an offence. We are not prepared to sustain this doctrine. That a principal should, in case of default, not indemnify his bail against the effects of his forfeiture or failure to attend and answer for the crime, has never been doubted by any body, and no authority is offered to support the position.

But, it is said, admitting both the bail bond and the lien to be good, the latter does not authorize Roberts and wife to take possession of the crop and deprive the family of Simpson from enjoying it. We look upon the instrument made by Williford to Roberts and wife, as a mortgage merely. It is denominated a *lien* twice upon the face of the instrument.

While Roberts and wife had no right to appropriate the crop and other property to themselves, they had the right to have it protected, and hence the appointment of a Receiver for this purpose was proper. But have not Mrs. Simpson and children rights secured to them by law, and of which no lien given by her husband can divest them? We think so, clearly, and in this way she can secure all the benefits that are sought to be accomplished by this litigation; and while we shall affirm the judgment of the Chancellor appointing a Receiver, we shall instruct him, by a decree in Chambers, to be granted at once, to direct his Receiver to appropriate so much and such parts of this property to the wife and children of this indigent man as is allowed by law for this

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purpose.—*Code, Sections 2013 and 2020.* The husband cannot by an *encumbrance* of any kind defeat his wife's claims.

The judgment affirmed, with instructions.

SHADRACK T. CRAWFORD, WILLIAM SIRINE, and others, plaintiffs in error, vs. WRIGHT BRADY, as administrator, *de bonis non*, of BUETON T. DENNARD, and as administrator of WILLIAM M. BRADY, and others, defendants in error.

- [1.] The absence of a party in the military service, did not, under the act of 1861, oblige the Court to grant a continuance. It was subject to discretion.
- [2.] Parol evidence is admissible to explain material alterations and ambiguities in a written instrument.
- [3.] The bond in this case, created a right in the husband *as trustee* of his wife, and a Court of Equity will carry out the trust.
- [4.] This not being a settlement made by the husband upon the wife, is not void against his creditors because not recorded.
- [5.] To defeat the wife's title by survivorship, the husband must reduce her property to possession as husband.
- [6.] The facts of this case do not show such a reduction to possession by the husband in his lifetime as will defeat his wife's title by survivorship.

In Equity. In Sumter Superior Court. Bill for Discovery, Injunction and Direction. . Tried before Judge CLARK. April Term, 1864.

Counsel for Crawford and several others, creditors of Wm. M. Brady, deceased, moved to continue the case, stating that until November last, he, the counsel, had been in the military service of the Government; that during his connection with the service he was unable to prepare for the trial of said case; that two of the principal creditors whom he represented, were not in attendance on the Court, and he desired their presence and assistance; that he understood one of them (Sirrine) was in the military service of the Confed-

erate States and absent from the Court on that account. It appeared further that Mr. Sirrine entered the service about six weeks before the Term of the Court commenced. The Court overruled the motion, on the ground that Sirrine not having been in the service until six weeks before the Court met, he had full opportunity to have conferred with his counsel relative to the trial of the case. This ruling was excepted to.

The case was then submitted to the jury, and the evidence disclosed the following facts :

William Dennard died, leaving a will, in which all his property, then worth about 30.000.00, except a few small legacies, was given to his wife and his son Burton T., nothing being given to his daughter, Mrs. Wm. M. Brady. Shortly thereafter, Brady, in right of his wife, and his wife, filed a caveat against the probate of the will. Pending proceedings for that purpose, Burton T. Dennard agreed to turn over an amount equal to one-third of the estate belonging to Wm. Dennard when he died, if said caveat was withdrawn. The proposed compromise was accepted, and a bond was executed by Burton T. Dennard, with N. Collier as security, in pursuance of the agreement stated, of which the following is a copy :

" Georgia, }
Baker County }

Know all men by these presents, that we, Burton T. Dennard and Needham Collier are held and firmly bound unto William M. Brady, in trust for his wife, in the sum of \$15,000, for the true payment of which we bind ourselves, our heirs, executors and administrators jointly and severally, unto the said William M. Brady, his heirs and assigns. Sealed with our seals and dated this 28th September, 1852.

The condition of the above bond is such that whereas there is a law suit pending on the appeal in Baker Superior Court, at the instance of William M. Brady, in right of his wife, contesting and caveating the will and testament of

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William Dennard, deceased, which is propounded by Irene Dennard, executrix of said will; and whereas, the said Irene Dennard and the said Burton T. Dennard, the principal legatees under said will, have this day consented and agreed to compromise and settle said lawsuit on the following terms and stipulations, to-wit:

1st. The said Wm. M. Brady, in consideration of the stipulations of the other parties, doth hereby agree to withdraw his caveat and objection to the said will, and allow the same to stand as the only true last will and testament of the said Wm. Dennard, deceased. 2d. That said Irene Dennard is to receive the property bequeathed to her under said will. 3d. The said Burton T. Dennard doth agree, out of the residue of said estate, to which he is entitled under said will, to convey to the said Wm. M. Brady, in trust for his wife Julia, an amount equal to one-third of the whole estate of which the said Wm. Dennard died seized and possessed, and the increase up to the time of the division, as soon as he shall have attained to the age of twenty-one years. Now should the said Burton T. Dennard, his heirs, executors and administrators well and truly perform the stipulations and agreement as above set forth, unto the said Wm. M. Brady, his heirs and assigns, then, and in that event, this bond to be void, else to remain in full force and effect.

(Signed)

BURTON T. DENNARD, [L.S.]

N. W. COLLIER, [L.S.]

Test—JOHN A. DAVIS,

Not. Pub. Baker Co."

This bond was originally drawn payable to "Wm. M. Brady, in right of his wife," but when Burton T. Dennard came to execute it, Collier suggested to him to have it so changed as to settle the property on Mrs. Brady, and Burton T. then refused to sign it until the words "in right of" were erased, and the words "in trust for" substituted. Wm. M. Brady was not present when the bond was executed, but this change in the phraseology was afterwards mentioned to him by Mr. Davis, and he acquiesced in it.

[Counsel for creditors objected to this testimony as to the changes made in the bond, and what was said when it was executed; but the Court overruled the objection, and admitted the evidence, to show that the bond had been accepted by Brady with the understanding that it was intended, and its effect was, to create a separate estate in his wife.]

Burton Dennard became twenty-one years of age in January, 1853, and his share of his father's estate was then turned over to him, and he and Brady went jointly into the possession of the lands and negroes, Brady having very little property of his own; and they commenced, in January, 1853, to crop together, and continued so to do until December following, when Burton Dennard died. No conveyance was ever formally executed by him, but he ratified said bond after he became of age. After his death Brady administered on his estate, paid a part of the debts, and subsequently obtained an order from the Ordinary to sell Dennard's undivided two-thirds interest in the negroes jointly possessed, as aforesaid, by the said Dennard and Brady at the death of the former. A sale took place accordingly. One of the negroes was sold to and paid for by one Kendrick. The remainder were, at Wm. M. Brady's request, bid in by Wright Brady for the estate, and went back into the possession of Wm. M. Brady, Wright Brady paying nothing on his bid. Wm. M. Brady, as administrator aforesaid, made no returns to the Ordinary of said sale, or of any of his dealings with the estate of Dennard. He and his family remained on the plantation, cultivating the same with the negroes possessed by him and Dennard in the lifetime of the latter, until January, 1857, when he died, leaving debts and judgments of the said Dennard unpaid, and a large amount of debts, mostly in judgment, due by himself, unpaid also.

The following unpaid *fi. fas.* against Wm. M. Brady, amongst a great many others of a subsequent date, were in evidence: One in favor of L. G. Sutton for principal \$250, interest to January 1st, 1854, \$52.50, cost \$14.00; one in favor of Morehouse & Co. for principal \$150.00, interest to

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12th November, 1852, \$15.96, cost \$11.00; one in favor of J. B. Ross & Co. for principal \$90.00, interest to 12th November, 1852, \$5.50, cost \$22.00.

The bond made to Brady in trust for his wife was never recorded, and his creditors had no notice of its existence. Their debts were contracted whilst he was in the possession of said property belonging originally to old Mr. Dennard, perhaps, but there was no proof of this, except the date of the judgments and the memorandum of the date from which interest was counted.

Counsel for plaintiffs in error requested the Court to charge the jury :

1. That said bond does not create a separate estate in Mrs. Brady, now Mrs. Wilcher.

2. That the suit respecting old Mr. Dennard's will having been compromised on the terms mentioned, the making of the bond by Burton Dennard and its subsequent ratification by him was a reduction into possession by Wm. M. Brady of his wife's interest in her father's estate under said compromise.

3. That said bond was a debt due to Wm. M. Brady, and as such passed to his legal representatives, and not to his wife who survived him.

4. That Wm. M. Brady's possession of said property, jointly with said Burton Dennard, after the latter became of age, was, in legal contemplation, a reduction into possession, as husband, of the undivided interest of which he was possessed.

5. That said bond never having been recorded, was void against *bona fide* creditors without notice, so far as it should be held to create a separate estate in the wife.

6. That if said bond created a separate estate, it was in that respect an agreement which stands on a similar footing with executory marriage articles, and will not be enforced to the prejudice of *bona fide* creditors without notice.

7. That if the jury believe that suits were pending against Wm. M. Brady when said compromise was made and said

bond was executed, and that he was then in embarrassed circumstances, he could only consent to or make such a settlement on his wife as a Court of Equity would have compelled him, on her application, to make, to-wit, a reasonable settlement; and if the jury believe, under the instructions of the Court, that said bond creates a separate estate in Mrs. Brady, and that it was made when he was being sued for debt and in embarrassed circumstances, then, the jury will determine whether the amount settled on her by said bond was such an amount as a Court of Equity would have required her husband to settle on her if she had applied for it; and if not, they will only enforce it for such an amount as they deem, under the facts of the case, would have been an adequate and reasonable settlement.

8. That if Wm. M. Brady procured an order to sell the undivided interest of Burton T. Dennard, deceased, in said negroes, and exposed it to sale, and at his request the negroes were bid in for the estate, this was a reduction of the said Dennard's negroes into his possession as husband; especially, if the jury believe that his wife was the only heir at law, and that Wm. M. Brady used the property of the said Dennard without making any return or accounting for the use of it in any way after Dennard's death.

The Court refused to charge any of said requests, but charged that the contrary thereof was the law.

The errors assigned are:

1. The refusal of the Court to continue the case.
2. The admission of the evidence relative to the erasure in the bond, and what was said by Collier and Dennard at the time.
3. The refusal to charge as requested, and charging to the contrary.

LAWLER & ANDERSON, for the plaintiffs in error.

McCAY and HILL, for defendants.

WALKER, J. •

[1.] We think the Court did not err in overruling the motion to continue the case, on the ground of the absence of the party in the military service. The act of 1861, *Pamph. Acts. p. 59*, only "authorized" the Courts to continue for this cause. It was not *compulsory*. In this case, it does not appear that any harm was done the absent party; it was not alleged that his presence was necessary to enable the attorney to represent his rights. The statement of the attorney was that he *desired the presence* of his client. This is no legal reason for a continuance. In showings for Providential absence, the counsel must state, in his place, that he cannot go safely to trial without the presence of his client. *Code*, see 3453.

[2.] The bond of Burton T. Dennard to Wm. M. Brady, in trust for his wife, had been materially altered, and the testimony of Davis was certainly admissible to explain the alteration. *Code*, sec. 3758. If there was any ambiguity in it, either patent or latent, it was admissible to explain that also. Sec. 3724.

[3.] What rights did this bond give to Mrs. Brady, now Mrs. Wilcher? We think it is an obligation, binding the obligor to pay to the trustee, for her use, *an amount equal to* one-third of old Mr. Dennard's estate. It is not a *conveyance*, but an *obligation for* a conveyance, which a Court of Equity will enforce. We think the intention was, to create a separate estate for the sole use of Mrs. Brady. This is very evident from the testimony of Davis, which shows that Burton T. Dennard intended "to settle the property on" her; and a Court of equity will carry into effect such intention. I am aware that some cases, decided by this Court, do not *seem* to harmonize very well with this view of the case, particularly *Denson vs. Patton*, 19 *Ga. R.* 577, and *Fears vs. Brooks*, 12 *Ga. R.* 195. These were cases where the conveyances had been *completed*, and all was done that was intended to be done; while this was a mere *obligation* to con-

vey, and the conveyance, when made, might declare the trusts *according to the intention of the parties*, "to settle the property on Mrs. Brady." Besides, when this case was before this Court on a former occasion, (24 Ga. R. 135) Judge McDonald, delivering the opinion of the Court, says: "After the satisfaction of that judgment, (one in favor of Jerry Cowles,) Mrs. Brady has *the highest* claim under the agreement of compromise. That agreement was never *executed* by a division of the property, and a *conveyance* in trust for Mrs. Brady, and she has a *right to demand its execution* before the property can be appropriated to the payment of the debts of her deceased brother. By the agreement of compromise she is entitled to it *as coming from her father's estate*, as it was on condition that she should have an amount equal to one-third of her deceased father's estate, if she and her deceased husband would abandon their proceedings against the will, which was done." This may not be a *decision* of the case, yet, as an expression of opinion of one of our predecessors who was, perhaps, as familiar with the law in relation to trusts, marriage settlements, &c., as any one who ever sat on this bench, it is entitled to much weight. Again, in *Johnson vs. Hines*, 31 Ga. Rep. 728, Judge Jenkins, delivering the opinion, lays down the rule that conveyances to the wife directly, either by the husband or another, may be upheld in Equity; that the conveyance is a declaration of a trust and Equity will hold him and his representatives bound by it; especially when the property came through the wife, *with an understanding that it should be her separate property*. 'The true intent of the parties will be carried into effect in Equity without regard to form.' In accordance, with these views, the *Code* says, *section 2288*: "No words of separate use are necessary to create a trust estate for the wife. The appointment of a trustee, or any words sufficient to create a trust, shall operate to create a separate estate." We think, therefore, the bond created a right in the husband, not in his individual character, but as the trustee of his wife, which a Court of Equity will enforce for *her use and benefit*.

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It is objected that the husband had no power to make the contract which he did with Barton T. Dennard. Could he not abandon the caveat if he chose to do so? We think so. It is true there was an agreement, that on his doing so and the will being established, his wife should, in effect, share equally with her brother and step-mother, in the estate of her father. Was there any thing wrong in this? Upon the establishment of the will the whole property went to Mrs. Dennard and Barton; and by the course pursued by Brady and wife, an amount equal to one-third, was to be settled on her. How are the plaintiffs wronged by this arrangement? We are unable to see. The complaint must be that Brady did not *litigate and recover* the property for them. That he ought to have paid his debts is very true; but that he failed to place this fund, belonging to his wife, within the reach of his creditors is equally true.

[4] Again, it is insisted that this bond is void under the act of 1847, *Pamph. p. 57*, "To require marriage settlements to be recorded." That act contemplates a settlement made *by the husband*, and does not apply to a case like this. See *Code, Section 1727*.

Again, it is insisted that as Mrs. Brady was the sole heir at law, of Burton T. Dennard, deceased, and that as William M. Brady took possession of the estate of Burton T., that was such a reduction to possession, as would vest in him the title to the property left by Burton.

[5] The rule in such a case is, that "the husband must reduce the wife's property or choses in action to possession *as husband*, in order to defeat the wife's title by survivorship." 24 *Ga. R.* 136. Upon the death of Burton T. Dennard, Brady took out letters of administration on his estate, and administered the estate in part. We have looked through the record in vain to find any evidence that he held possession otherwise than *as administrator*. As such administrator he was entitled to the possession of the property, but such possession could not be called an *administration of it*. His title could become complete only after the payment of

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the debts of Burton T. Dennard. These debts were not paid during the lifetime of Wm. M. Brady. *As administrator*, Brady procured an order of sale, and exposed the negroes to sale, and for some reason, perhaps because they did not sell for as much as he thought they should, Wright Brady, *at his request*, "bid then in *for the estate*."

[6] We think the facts show that his possession was as *administrator* and not as *husband*. This being the case, upon his death, the wife became entitled to receive, as sole heir at law, the property of her deceased brother.

Judgment affirmed.

CLAYTON & KENNADY, plaintiffs in error, vs. FRANCIS O'CONNER, defendant in error.

[1] *Clayton & Kennady vs. O'Connor*, 29 Ga. R., 567, affirmed.

[2] The owner of a promissory note on an insolvent person who, by a fraud, put its off on an innocent purchaser, is liable to refund to the latter the money received for it, with interest.

Case. In Richmond Superior Court. Tried before Judge HOLT. November Term, 1860.

This was an action of deceit in the sale of a note to the plaintiffs by the defendant.

The note was as follows:

"AUGUSTA, GA., Oct. 8th, 1856.

Ninety days after date I promise to pay to the order of D. T. Smith eight hundred dollars, at either bank in this city. Value received.

(Signed)

JOHN C. CARMICHAEL."

Endorsed thus: "D. T. Smith."

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Evidence for the Plaintiffs.

A. W. Walton—Lived with plaintiffs as book-keeper, on the 4th of December, 1856. Defendant came into the store of plaintiffs on that day, between 12 o'clock m. and 2 o'clock p. m. and offered to sell them a note on John C. Carmichael, payable to the order of D. T. Smith, and indorsed by Smith in blank, for \$800. Said note was dated October 8th, 1856, and was payable ninety days after date. After some conversation, John J. Clayton, one of the plaintiffs, told witness to draw a check on the Mechanics Bank for \$762 50. Clayton told defendant to indorse the note. Defendant answered, in a jocular manner, and just as he was going out, that his name would make the note no better; that Carmichael was as good as any man in the city of Augusta, and would pay the note at maturity. Defendant took the check and left the store. Plaintiffs learned, a little while after, on the same day, that Carmichael had failed. Defendant lives in South Carolina. Plaintiffs sent to the bridge and elsewhere to intercept the defendant before he got over the river, but did not find him. The check was paid by the Mechanics Bank. Two or three days after, plaintiffs sent witness over to see defendant, who lives seven or eight miles from Augusta, to return him the note, get his endorsement upon it, or the money. Witness offered to return the note to defendant and take back the money, or keep the note with defendant's endorsement. Defendant would not assent to either of these arrangements. Witness told defendant that Carmichael had failed at the time the note was passed, and it was worthless. Defendant replied that he did not make child's bargains.

Cross-Examined—The note was turned over to L. D. Lallerstedt, Esq., by the plaintiffs, to be put in suit, and was in his hands at maturity. Witness did not call on Carmichael for payment; does not know that Carmichael was ever called upon. Carmichael failed two or three days before the sale of the note, but his failure was not generally known. Plaintiffs did not know of it until an hour or two after the trade.

Witness considers the note worthless; neither Carmichael nor Smith, the indorser, is solvent. Carmichael was in good credit, and did a large business, up to the time of his failure. Plaintiffs had dealt in paper with his indorsement at a discount before. They had some on hand at that time, but it was subsequently arranged by the makers. Witness heard Kennady, one of the plaintiffs, say he had met defendant in the street. When defendant said Carmichael was as good as any man in the city, the agreement was already made and the check drawn. Witness is not certain whether the check had been delivered to defendant or not. Kennady, one of the plaintiffs, was approaching defendant when the remark was made.

L. D. Lallerstedt—Thought that Carmichael was insolvent at the time of the trade. His opinion was formed on the fact that he was a Bank director, and had heard it said at the Bank and in the street that Carmichael was insolvent. [Counsel for defendant moved to rule out this testimony, on the ground that the opinion of the witness was not competent evidence on the direct examination, and especially so when founded on facts themselves inadmissible in evidence. The Court overruled the objection, and the witness proceeded.] Defendant came into the store of witness the morning of the 4th of December, 1856, and offered to sell him the note in evidence. Witness told defendant that Carmichael had failed, and the note was worthless. Defendant left and went down town.

Cross-examined—The note was put into the hands of witness for collection by Kennedy & Clayton some time subsequent to the day just mentioned. Witness heard of the failure of Carmichael two or three days previous to the 4th of December, 1856. His failure was not generally known. Witness knows of no payments made by Carmichael since his failure. He was in good credit previous to his failure. Witness did not present the note to him for payment. The note was due about the 9th of January, 1857. D. T. Smith was held to bail, and attachments issued, and garnishments

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were served on several persons, under the statute in such case made and provided. Garnishments were served, witness thinks, on the firm of auctioneers who sold the stock in trade of D. T. Smith. The garnishees answered that they had nothing in their hands belonging to D. T. Smith. Smith kept a drug-store. Witness thinks his stock was worth \$3,000 or \$4,000. Witness called upon Smith in the latter part of December, 1856, to make arrangements to have the note paid. Smith refused to make any arrangements. The note was not due at that time. Smith was held to bail, but absconded before the maturity of the note. Witness looked about for defendant at the maturity of the note, but heard he had gone away ten days previously.

Charles J. Goodwin—Was a clerk in the store of Lallerstedt & Deming on the 4th of December, 1856. The morning of that day defendant came into the store and walked to the back part of it, where Lallerstedt was sitting, and offered to sell him a note on Jno. C. Carmichael. Lallerstedt told him (defendant) that Carmichael had failed, and the note was worthless. After some conversation, defendant left and went away.

James P. Allen—Lived with D. T. Smith on the 4th of December, 1856, as book-keeper and salesman. Does not believe that Smith was solvent, among other reasons, because he went away, leaving several debts unpaid. Witness has not much opinion of him.

Cross-examined—Smith bought about \$1,200 of his stock at Sheriff's sale two or three months before the 4th of December, 1856, and paid cash for it. Then he went North and bought more stock, which, witness thinks, he did not pay for. He sold his stock on the 27th of December, 1856, and received about \$4,000 for it. Up to that time he had sold to the amount of \$1,800 or \$2,000. He claimed some negroes—a boy and a woman—that belonged to his wife. Witness thinks the boy was worth \$3,000 and the woman \$800. Smith gave security for his board when he first came; got married shortly afterwards, which gave him some credit.

He ran away and left his wife behind. He owed money to hundreds of persons. Witness can specify only two of these, and can specify no amount.

E. Starnes, Esq.—Believes at this time that Carmichael was insolvent on the 3d of December, 1856. Witness had occasion professionally to become acquainted with Carmichael's affairs, and found them very much embarrassed. Witness was not prepared to say that it was his opinion, on the 3d of December, 1856, that Carmichael was insolvent. Carmichael made an assignment of his property on that day.

Cross-examined—Witness held large claims against Carmichael at that time. In connection with professional brethren who held other claims, he attacked the assignment as fraudulent; all the claims were paid in full, principal, interest and cost, by the assignees. The opinion of witness is that, in order to have made indorser of the note in evidence responsible, the note should have been put in bank and protected for non-payment, and demand should have been made of the indorser.

John C. Sneed, Esq.—Received from Philadelphia an account and note against D. T. Smith. At the time of their receipt they were not due. The aggregate of both was between \$800 and \$1,000. Witness did not succeed in collecting either. Both were sent back.

Evidence for Defendant.

Thomas Whyte—Was a member of the firm of Girardy, Whyte & Co., on the 27th of December, 1856. Said firm sold the stock of D. T. Smith, and turned over to Smith \$4,000. No garnishment was served on the firm. They may have been served upon some individual of the firm.

Cross-examined—Smith had some small accounts with the firm of Girardy, Whyte & Co., all of which he paid. Witness has seen Smith several times with large rolls of bank bills.

James H. Gray—Collected \$1,200 from D. T. Smith on a note for that amount, bearing the same date and payable

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the same time as the one in evidence. Witness was the agent of defendant, and loaned two thousand dollars, this present claim and \$1,200. Witness took a mortgage on Smith's stock for the \$1,200, and assigned it to the auctioneers who sold said stock. The \$1,200 was paid by the check of Girardy, Whyte & Co., on account of Smith. Witness believed, on the 4th of December, 1856, that Smith was solvent, and witness was in the habit of lending him money, in amount from \$100 to \$300. Sometimes took his due bill—sometimes did not.

Cross-examined—Defendant is a money lender.

John K. Jackson, Esq.—Was counsel for creditors of John C. Carmichael. From information of facts acquired by witness in that transaction, witness is of the opinion that Carmichael was not fairly insolvent on the 4th of December, 1856. Witness did not think so then, and does not now. When D. T. Smith was held to bail by plaintiffs the firm of Millers & Jackson were retained by Smith. Witness was a member of that firm, and as such, proceeded to the defence of that case. Before the trial Term, Smith disappeared before arranging for fees, and said firm notified David L. Adams, who was the security upon Smith's bail bond, that they should no longer appear in said case, unless he wished them and employed them for that purpose. Mr. Adams was entirely good for the debt. Upon the trial the plaintiffs' suit was—solely on the ground of the want of demand of payment of the note, and of notice of non-payment to Smith. The note sued on in that case was the note offered in evidence in this. The record shown to witness is the original record and bail bond in that case. It was the Sheriff's duty to take good security. No exception was taken by the plaintiffs to the sufficiency of the security. Mr. Adams' credit was good and is now. Witness had some business transactions with Smith about the 24th of September, 1856, and was of the opinion then that he was solvent; had no reason to doubt it until his arrest under bail process.

The presiding Judge, by consent of parties, stated that

his recollection of the bail case, so far as the causes of plaintiffs' defeat are concerned, agreed with Mr. Jackson's.

The defendant then introduced the record of the bail case against Smith, which showed that the process issued December 27th, 1856, upon an affidavit made by Kennady, one of the plaintiffs, and that a bail bond, with D. L. Adams as security, was given two days thereafter.

Here the evidence closed, and the jury returned a verdict in favor of the plaintiffs for \$762 50 principal, with \$209 60 interest.

The defendant moved for a new trial, on three grounds :

1. Because L. D. Lallerstedt was allowed to testify that, in his opinion, Carmichael was insolvent on the 4th of December, 1856, he stating that his opinion was formed on what he had heard on the street and in the Bank of Augusta.

2. Because A. W. Walton was allowed to testify that his opinion, on the day of the trade, was, that Carmichael was insolvent, he stating that his opinion was formed on the fact that he had heard the night before that Carmichael was in embarrassed circumstances.

3. Because the verdict was contrary to law and evidence.

The Court granted a new trial on the 3d ground ; and this is alleged as error.

LALLERSTEDT and SHEWMAKE, for plaintiffs in error.

CUMMING, for defendant.

HARRIS, J.

[1.] Several of the questions discussed to-day were argued and decided, it seems by reference to 29th *Ga. R.* 687, when this case was here for the first time. Nothing has been now presented which can or ought to lead us to reverse or modify what was then decided.

[2.] The testimony produces a very strong conviction of a

 Adm'r. of Butler vs. Hughes.

glaring fraud having been practiced by the defendant in error in the sale to Clayton & Kennady of Carmichael's note, knowing at the time that the paper was worthless. The plaintiffs having taken, promptly, steps for the rescission of the fraudulent contract, and being without fault or in laches, so far as we can discover, they were fairly entitled to recover the amount, with interest paid by them, from defendant. Entertaining, without any doubt whatever, the right of plaintiffs to this measure of justice, we think the Judge below erred in granting a new trial on the ground that the verdict was contrary to law and evidence, and accordingly reverse his decision.

Judgment reversed.



ADMINISTRATOR OF JOEL BUTLER, deceased, plaintiff in error,
vs. ELBERT W. HUGHES, defendant in error.

[1] Presumption of gift when slave went home with a daughter, on her marriage.

[2] Parol gift of slaves, perfected by delivery, was not rendered invalid by Act of 1834. That Act, neither in letter nor in spirit, extended to such a case.

Complaint for Negroes. In Twiggs Superior Court.
Tried before Judge COLE. September Term, 1866.

This action was by the plaintiff in error against the defendant in error. Witnesses for the plaintiff proved, among other things, that the negroes sued for were in possession of the plaintiff's intestate, Butler, in the year 1830, he controlling them, and exercising acts of ownership over them, as his own property; that the defendant, Hughes, married the daughter of said Butler, in October, 1830; and after his marriage, he took these negroes home with him, with Butler's consent, and retained possession of them; was in pos-

session of them at the death of his wife; that Mrs. Hughes died before this suit was instituted: Also, that Butler made demand for the negroes, of Hughes, before the suit was brought: Also, the value of the hire of the negroes. He, Butler, said he had given the negroes to his daughter, Mrs. Hughes. It was further proven that after the negroes went into possession of Hughes, he, Butler, exchanged another slave for one of those which had gone into Hughes' possession.

Counsel for the plaintiff requested the Court to instruct the jury, that under, and by virtue of, the Act of the Legislature passed in 1856, if the jury believe, from the evidence, that the gift of the negroes in question was a gift by parol, then, Hughes acquired no title, and the plaintiff was entitled to recover. This charge the Court declined to give; but instructed the jury that the Act of 1856, prohibited the bringing of any action to charge any person, upon any contract of sale or gift of slaves, unless the agreement, or contract, or gift, etc., be in writing; but that a defendant claiming title to a slave, by parol gift or contract which was executed by delivery into possession, could defend upon such parol gift or contract; and if the jury believed, from the evidence, that the negroes in question were thus given by parol, then, the plaintiff was not entitled to recover.

The Court further charged the jury, that if, from the evidence, they believed that Butler, upon the marriage of Hughes, sent the negroes home with his daughter, Mrs. Hughes, then, that fact is presumptive evidence of, a perfected gift.

The refusal to charge, and the charges, as given, are assigned as error.

E. A. & J. T. NISBET, for plaintiff in error.

BAILY and DEGRAFFENREID, for defendant.

 Anderson vs. Walton.

HARRIS, J.

[1.] Following the decisions in South Carolina, the Courts of Georgia, for the last thirty years, have uniformly held that slaves going home with a daughter on her marriage, the possession and dominion of the father ceasing, without clear and convincing proof that they were merely temporarily loaned to the son-in-law, would be presumed to have been given, absolutely, as an advancement to the child thus married. We find nothing in the testimony before us, showing any understanding or agreement between the father-in-law and the son-in-law, which does or ought to rebut the presumption which the law creates, of an absolute gift.

[2.] The Act of 1856, relied on by plaintiff's counsel, by its letter and spirit, acts only on persons *instituting suits on parol gifts of slaves for their recovery*, and never could have been intended to affect the title of one holding by actual delivery and possession.

Let the judgment below be affirmed.

JOHN L. ANDERSON, plaintiff in error, vs. RICHARD T. WALTON, defendant in error.

[1] Abatement in the rigor of the law, as respects sureties. Modern decisions regarded in interpreting old law.

[2] Demurrer to bill, admits allegations in the latter to be true.

The principal in a judgement being insolvent, and having, after rendition of the judgment, sold property, an injunction against the purchaser, who was about to remove the property from the County, was properly granted at the instance of the surety.

[3] In such case, the surety is entitled to the injunction without first paying the debt.

[4] Impure pleas must be sworn to; and certain pleas in this case were of that character. Certain other pleas properly overruled.

In Equity. In Wilkes Superior Court. Demurrer to Bill,

and Demurrer to Plea. Decided by Judge WILLIAM M. REESE. September Term, 1866.

On the 9th of November, 1865, Walton, the defendant in error, filed his Bill in Wilkes Superior Court against Anderson, the plaintiff in error, making the following case:

A judgment was rendered in said Court, at March Term, 1861, in favor of Nicholas Taliaferro, against Phebe Stinson, as principal, and Walton, as security, which is still unpaid, and Mrs. Stinson is insolvent. The stay-law was in force at the rendition of the judgment; and the stay-ordinance of the Convention was operating at the time of filing the bill.

Anderson, well knowing of the judgement and its lien, purchased of Mrs. Stinson eighteen bales of cotton, which he mixed with his own cotton, so that the same cannot, by any means in complainant's power, be distinguished and identified. He is removing said cotton beyond the limits of Wilkes county, to market, having some of it upon the cars for that purpose, at the time the bill was filed. The whole of the eighteen bales, at the ordinary price, would be insufficient to pay off the judgment.

The bill prayed for discovery and general relief, and especially for an injunction restraining Anderson from selling the cotton or removing it from the county, until after he should give bond and security for its forthcoming to answer and satisfy said judgment.

The Judge sanctioned the bill, and ordered an injunction requiring Anderson "not to remove said eighteen bales of cotton, until he shall have given bond and security for the forthcoming of the same, or the proceeds thereof, to answer the final judgment in this case."

The defendant demurred to the bill on several grounds.

(1) For want of Equity. (2) Because the remedy at law was complete. (3) Because a copy of the judgment and fi. fa. was not attached to the bill as an exhibit. (4) Because no affidavit had been made by complainant to entitle him to proceed under the stay-law and stay-ordinance. (5) Because the

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complainant had not paid off and taken control of the fi. fa. (6) Because no injunction was in fact sued out as prayed for, nor any bond given by complainant as required by law. (7) Because there was not, and never had been, any law to prohibit a levy of the execution on the cotton. (8) Because it was not alleged that any judgments were against Phebe Stinson older than the one in question.

The Court overruled the demurrer.

The defendant also filed several pleas:

1. That he was a *bona fide* purchaser of the cotton for valuable consideration, without notice of the judgment or the lien thereof, and had been in possession of the cotton more than two years before the filing of the bill.

2. That complainant does not appear, by the said judgment and execution, to be surety, but a joint principal; and that the judgment, if controlled by him as surety, would not interfere with defendant, a *bona fide* purchaser without notice, whose rights were vested before any order giving the control to complainant has been granted.

3. That complainant is not surety, but a principal.

4. That, even if a surety, he has never paid off the fi. fa. and taken control of it.

5. That there never has been any law that could prohibit a levy on the cotton, if subject.

The complainant demurred to these pleas as presenting no sufficient defence, and, moreover, to each of them specially, as follows:

To the first, as proper matter for answer and not for plea, except as to the alleged possession by defendant for two years; and, as to that, as being insufficient, because the statutes of limitation were suspended.

To the second and third, as matter for answer or demurrer, and not for plea.

To the fourth and fifth, as matter for demurrer, and not for plea.

The Court sustained the demurrer to the fourth and fifth pleas, but decided the first, second and third to be good and

sufficient, if supported by a sworn answer, and ordered them each to stand for an answer, provided the defendant would swear to them.

Both parties excepted; Anderson alleging error in overruling the demurrer to the bill, in sustaining the demurrer to the fourth and fifth pleas, and in requiring the first, second and third pleas to be sworn to; and Walton alleging error in holding these pleas sufficient, if sworn to.

ANDREWS and ALEXANDER, for Anderson.

BARNETT & BLECKLEY, for Walton.

HARRIS, J.

[1] The case of plaintiff in error has been very elaborately argued; and we have been called on, by the distinguished counsel representing him, to enforce the rigid decisions of the common law of the last century, in reference to securities. We will go into no argument now, nor review the decisions cited, or read, to demonstrate, as could be easily done by reference to elementary treatises issued from the British press within the last twenty years, how greatly the old rules have been relaxed, and old decisions modified. Bound, as we are, by the principles of the common law as they existed at the time of our adopting Act, yet we shall not hesitate to avail ourselves of the invaluable light which modern decisions and elementary works have furnished, in interpreting what are called old principles. But the statutory legislation of Georgia, for the last forty years, when viewed apart from the common law, in its collective spirit, its continued progress, is so marked by tenderness for securities and endorsers that it has sought, in almost every conceivable mode, to give them protection, and the ample use of the process of the Courts for such purpose, and, especially, to avert apprehended loss.

[2.] Obeying the spirit of our own legislation, it is difficult for us to perceive how the Circuit Judge, upon the

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facts alleged in the bill of Walton, and sworn to, could withhold his injunction restraining the sale of the cotton by the plaintiff in error, though he was a purchaser for a valuable consideration, as the cotton was unquestionably affected by the judgment of Taliaferro, obtained in 1861.

Whether the defendant in error was a security or not for Mrs. Stinson, will doubtless arise hereafter, and be decided by proof. It is, however, so alleged in the bill, and the demurrer of plaintiff in error precludes him from denying it. If a security, and the facts alleged in his bill are true,—and the demurrer admits them to be true,—we have not the slightest doubt that Walton was entitled to the aid of a Court of Equity in trying to save his property from satisfying Taliaferro's execution, when Mrs. Stinson had property in the hands of Anderson, (she being insolvent) bound by the judgment of Taliaferro, and which ought to be applied to its discharge.

[3.] We think Judge Reese did not err in overruling the demurrer; holding, as we do, that the peculiar facts set forth in the bill for discovery, injunction and relief, entitled a security placed in the situation of Walton—and that without paying up Taliaferro's execution—to claim and have the restraining power of the Judge of the Superior Court, against the sale or removal of the cotton liable to and bound by the judgment of Taliaferro, so as to prevent a serious loss to him, there being no adequate remedy at law, and this too, notwithstanding the inaction of Taliaferro, from whatever supposed legal obstacle it may have proceeded.

[4.] The record shows that six pleas were filed by Anderson, none of which were sworn to. Four were ordered to stand for an answer, upon being sworn to; the other two were dismissed as embodying matter proper only to be considered by way of demurrer. The four pleas referred to, when examined, will be found to be what our Code denominates as Impure pleas, and must, in all case, be sworn to. Nor was there error in dismissing the other two pleas, for the reason assigned.

Judgment affirmed.

E. D. MAHONE, plaintiff in error, vs. T. D. PERKINSON, defendant in error.

A Court has power to amend its judgments and executions so as to make them conform to the verdicts upon which they are predicated.

Motion. In Cherokee Superior Court. Decided by Judge MILNER. November, 1866.

At September Term, 1863, of Cherokee Superior Court, a verdict was rendered in favor of Perkinson, against Mahone, on an attachment sued out by the former against the latter and levied upon certain lands. Nothing had occurred to entitle the plaintiff in attachment to enter up a *general* judgment on said verdict. Nevertheless, he did enter such a judgment, and the Clerk issued thereon, against Mahone, a general *fi. fa.* This *fi. fa.* was levied upon the lands on which the attachment had been levied. The lands were sold by the Sheriff by virtue of said levy, and Perkinson became the purchaser. A large balance appearing still to be due on the *fi. fa.*, it was subsequently levied on other property, real and personal.

Before this last levy was disposed of, to-wit, at the September Term, 1866, of Cherokee Superior Court, counsel for Mahone moved to set aside both the judgment and the *fi. fa.* Pending this motion, and at the same Term of the Court, counsel for Perkinson moved to amend the judgment.

By consent of parties both motions were heard by Judge MILNER, in November, 1866, who disposed of them together, overruling the motion to set aside the judgment, and ordering and adjudging that the plaintiff have leave to amend the judgment by changing the same from a general judgment in *personam* to a judgment in *rem* upon the property on which the attachment was levied; and that the *fi. fa.* be annulled and set aside, and a new *fi. fa.* issued in conformity to the judgment as amended.

Mahone assigns for error the refusal to set aside the judgment, and the granting of leave to amend it.

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LESTER, for plaintiff in error.

HANSELL and BLECKLEY; for defendant.

WALKER, J.

The judgment in this case is affirmed, for the reasons that the judgment was incorrectly entered up, *Code*, sec. 3241; and the Court had the power, and it was his duty, to amend the judgment and execution, so as to make them conform to the legal effect of the verdict. Sections 3424-5.

GLENN O. WYNNE, plaintiff in error, vs. R. H. LUMPKIN, and others, defendants in error.

[1.] Generally, the county of a person's residence is the one in which to locate a suit against him in Equity. Where, however, there are several defendants, and substantial relief is prayed against all of them, the suit may be brought where any one of them resides. Thus, where a bill charges a trustee with making a fraudulent sale of lands, and both the vendee and the tenant of the vendee are sued with him, relief being prayed against them all, the Court in the county of the tenant's residence has jurisdiction of the whole cause, and of all the parties.

[2.] Equity will cancel an illegal deed that forms a cloud upon the true title.

[3.] The bill, in this case, was not multifarious. All the defendants were proper parties, and there was but a single subject matter.

In Equity. In Oglethorpe Superior Court. Demurrer.
Decided by Judge Hook. April Term, 1866.

By the will of John Wynne, dated in 1856, certain property, including a tract of land in Oglethorpe county, was left to his wife for life, "and after her death, such as may be then in her possession, and not previously sold or disposed of by her, to be divided" among his sons Thomas, Glenn, and George, his granddaughter Susannah Stevens, and the

two children of his deceased son William, the last to take *per stirpes*.

The share of Thomas was to vest in the said Glenn in trust, for the support and maintenance of Thomas and his children, free from the contracts, liabilities and control of Thomas, and at his death to be equally divided among his children then living, and the representatives of any that might be deceased, such representatives to take *per stirpes*.

The will was admitted to probate; the executors qualified, and afterwards obtained letters of dismission. The testator's son George died without issue. Subsequently, the tenant for life died, leaving the tract of land undisposed of. Letters of administration *de bonis non*, with the will annexed, were granted to the testator's son Glenn, who is a resident of Coweta county. In 1864, Patrick M. Stevens, (the father of Susannah, the testator's granddaughter,) Sarah F. Wynne, (the mother of the two children of the testator's deceased son William,) and Thomas Wynne, the testator's son, all residents of Oglethorpe county, combining to aid and abet the said administrator in illegally selling said land, obligated themselves in a bond to hold him harmless, should he make such sale without proper authority from the proper Court. The administrator then, without said authority, sold and conveyed the land, for spurious money, which soon afterwards became utterly worthless, to John G. Crane, then and now of the State of South Carolina, who purchased with notice that the sale was unauthorized by the will of the testator or the laws of Georgia, and who was in collusion with the administrator and the parties to the aforesaid bond, to misapply the assets of the testator's estate, and defeat the interest of Thomas Wynne's children, William Wynne's children, and the said Susannah Stevens, therein.

Under the said deed of conveyance to him, and with the consent, and by the procurement, of the administrator and the other three confederates, the said Crane went into possession of the land, and placed thereon, as tenant under him, one William R. Pertest, who still resides thereon, and who

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by his engagement with Crane, his landlord, will pay the rents and profits to him, and they will thus pass beyond the limits of this State.

A daughter of Thomas Wynne intermarried with Robert H. Lumpkin. The other children of Thomas, as well as the two children of William Wynne, deceased, and also the testator's granddaughter, Susannah Stevens, are all minors.

The present bill was filed by Lumpkin and wife, and by Lumpkin as the next friend of all of said minors, against Glenn Wynne, Thomas Wynne, Patrick M. Stevens, Sarah F. Wynne, John G. Crane, and William R. Perteet, alleging the foregoing facts; and, moreover, that the complainants know not whether those of the defendants residing in Georgia are solvent, but believe that the late emancipation of slaves has so damaged the estate of each that by reason of their many outstanding liabilities, the complainants will be benefitted by no decree except such as may be enforced upon the said land, and the rents and profits thereof, three-fourths of which the complainants claim as their property.

The bill prayed :

1. That Perteet, the tenant, be enjoined from paying over to Crane the rents and profits; that a receiver be appointed to take and hold the same, and to rent out the land, collect the rents, &c., until a final decree.

2. That the sale to Crane be rescinded and declared null and void, and the deed to him be cancelled; or, if good to convey the interest of Glenn and Thomas Wynne in said land, and its total cancellation would be injurious to Crane, that then the deed be declared null as to complainants' interest, and Crane be perpetually enjoined from claiming such interest under the same.

3. That the defendants account for the rents and profits accruing since the sale.

4. That the land be partitioned into four parts, and one of them assigned to Thomas Wynne and his children, subject to the provisions of the will, one to the two children of William Wynne, deceased, and one to Susannah Stevens.

5. That should other relief be denied, then that the defendants (except Perteet, the tenant,) be decreed to account for the true value of the land, with damages for withholding it.

6. For general relief.

7. For discovery from Perteet, the tenant, all discovery from the other defendants being expressly waived.

The defendant Glenn Wynne, alone, demurred to the bill on divers grounds :

1. (As to any relief sought against him as trustee for Thomas Wynne and his children) for want of jurisdiction in the Court, he, the defendant, being a resident of Coweta county.

2. For multifariousness.

3. For want of title in the complainants Lumpkin and wife and the children of Thomas Wynne, to the subject matter of the bill.

4. For want of such title in any of the complainants, and because, as to the minors, the bill should have been brought by their guardians.

5. For want of title in Lumpkin and wife to the rents and profits.

6. Because there is an adequate remedy at law.

7. For want of equity in the bill.

The demurrer was overruled by the Court; and this is complained of as error.

BUCHANAN, for plaintiff in error.

MATHEWS and REID, AKERMAN and BARROW, for defendants.

In this case Chief Justice Lumpkin did not preside, being related to one of the parties.

HARRIS, J.

[1.] The chief question made by the bill of exceptions is,

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whether the Superior Court of Oglethorpe county had rightful jurisdiction over Glenn Wynne, of Coweta county, one of the defendants.

As a general rule, a defendant has a constitutional right to be sued in the county of his residence, and not to be dragged to answer at a remote tribunal at the pleasure or will of a complainant. A most valuable privilege, which we will be careful not to endanger. Glenn Wynne is charged by the bill of complainants with conspiring and colluding with John G. Crane, of South Carolina, to defeat the interest of complainants in land sold to said Crane by him as administrator, such sale being unauthorized by the will of John Wynne or the laws of the State; as also in the misapplication of the assets of the testator's estate, and that Crane purchased with notice, and that Glenn Wynne illegally made to him a deed for the land, &c. These facts are admitted by the demurrer. Perteet, the tenant of Crane, residing in Oglethorpe, is a party defendant, and, as relief is sought from him, complainants were enabled to institute their suit properly in that county. If Glenn Wynne did make, as alleged, an illegal conveyance of land in which complainants were interested, to Crane, and that conveyance stood in the way of the complete assertion of their rights under the will of John Wynne, it is difficult to perceive how full relief could have been obtained anywhere without acting on Glenn Wynne. His connexion with Crane and tenant was of such a kind in law as to make him a necessary party; and if the jurisdiction of the Superior Court of Oglethorpe over Perteet, as tenant of Crane, was rightful, we are not able to perceive why it was not rightful also over Glenn O. Wynne.

[2.] We apprehend that is the office and duty of a Court of Equity to cause the deed made by Glenn O. Wynne to Crane, if illegal, or unauthorized, or if in any way it clouds or obstructs the title of complainants to the land under the will of John Wynne, to be cancelled.

[3.] Nor are we enabled to consider the bill in this case, in any proper sense, as multifarious; the transactions all

grow out of the sale of the land, and all the parties are intimately connected with, or concerned in them, and are consequently proper parties in reference to a proper subject matter.

We therefore affirm the judgment overruling the demurrer.

J. W. B. EDWARDS, plaintiff in error, vs. ELLISON BANKSMITH
and JAMES H. MULFORD, defendants in error.

[1.] The continuance or dissolution of an injunction, after the coming in of the answer, depends upon the sound discretion of the Court, according to the nature and circumstances of the case ; and unless such discretion be abused, this Court will not control the Court below in its exercise.

[2.] *Lis pendens* is a general notice of an equity to all the world.

Motion to Dissolve Injunction. Decided by Judge IRWIN.
At Chambers. October, 1866.

This was a bill filed by the plaintiff in error against the defendants in error, to set aside as fraudulent, a conveyance of certain lands lying in Cobb county, made by the former to Banksmith, one of the latter, who purchased for and on account of Mulford, his co-defendant. The fraud alleged was, that the defendants knew the land contained a valuable gold mine, and the complainant had no such knowledge, and that Banksmith, on being asked by complainant, during the negotiations, what the lands were wanted for, and whether they did not have gold upon them, replied that they were wanted for farming purposes, etc., and that if they contained gold he did not know it. The bill charged that Banksmith resided beyond the limits of this State, and that both defendants, (so far as complainant knew) were insolvent and unable to respond in damages. It prayed for an injunction

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to restrain the defendants from selling the lands and from working them as a mine; and the injunction was granted.

The answers denied that any gold had, so far as the defendants knew, been found on the lands either before or after the purchase. Mulford admitted, however, that the lands lay in or near what was considered the gold range or formation, between Lumpkin county, Ga., and Randolph county, Ala., and that on that account he caused the purchase to be made, acting altogether on a calculation of chances.

On the coming in of the answers, a motion was made to dissolve the injunction, when the complainant, in order to show the existence of a mine on the premises, submitted the affidavits of one Grantham and one Asbury :

Grantham deposed that, from the direction of a gold vein which he had opened on adjoining land, and his knowledge as a miner, he believed said vein ran through the lands in question, and was a valuable vein. Also that he had panned for gold on these lands and found from twenty-five to thirty particles of gold, to the panfull (not over one gallon) of earth.

Asbury deposed that he had been a practical miner for twenty years; that in company with Grantham, and after the latter had made an examination alone, he made a surface examination of these lands for gold; and from the gold he thus found, and the location of the lands, he considered them as valuable as any mining property in that country.

The presiding Judge dissolved the injunction, and that is complained of as erroneous.

DOUGHERTY, for plaintiff in error.

LESTER, for defendants.

WALKER, J.

[1.] "It is now well settled, that the continuance or dissolution of an injunction, after the coming in of the an-

swer, depends upon the sound discretion of the Court, according to the nature and circumstances of the case." *Swift vs. Swift*, 13 Ga. R. 145. And unless such discretion be abused, this Court will not control the Court below in its exercise. We see no abuse of the discretion in this case. Indeed, we can see no reason for continuing this injunction. Whether there be a valuable gold mine on the lands sold or not, is unknown. If, in the progress of the cause, circumstances may require the strong arm of a Court of Equity to interpose an extraordinary process, to protect the rights of complainant, such aid can be obtained when necessary, for "a Court of Equity is always open." *Code*, sec. 4131.

[2.] It is insisted, however, that the injunction should be continued to prevent Banksmith from selling the lands to an innocent purchaser without notice. Such a transfer, we apprehend, would not affect the rights of complainant. "It is a general rule that *lis pendens* is a general notice of an equity to all the world. 2 Bowv. L. D. 94 citing a number of authorities. In *Murray vs. Bollou*, 1 J. C. R. 576, Chancellor Kent says: "The established rule is, that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis pendens* begins from the service of the *subpoena* after the bill is filed." We think, then, that the pendency of this suit is notice to the world of the rights of the complainant in these lands, whatever those rights may be, and, that if he duly prosecute his suit, no subsequent purchaser can acquire an interest in them prior to a final decree, which can at all affect those rights.

Judgment affirmed.

Webb vs. Wynn.

ISAAC H. WEBB, plaintiff in error, vs. DAVID WYNN, executor of THOMAS H. WYNN, deceased, defendants in error.

Although the remedy at law may appear adequate, yet if a Judge enjoins a common law case, pending in his own Court, and there is not a manifest abuse of his discretion, the Supreme Court will not interfere.

Motion to Dissolve Injunction. Decided by Judge WOODRILL. At Chambers. July, 1868.

Thomas H. Wynn died in June, 1861, indebted to Webb, the plaintiff in error, on two promissory notes for one thousand dollars each, given in the year 1859, for the purchase money of land. One of said notes matured in January, 1861, and the other in January, 1862. Upon one of them, Wynn's executor, the defendant in error, paid \$300.00, in November, 1861, and Webb then took both notes home with him to the State of Louisiana, and there kept them.

In reply to a letter written by the executor to Webb, early in 1863, Webb wrote the following:

"SPRINGFIELD, LA., March 16th, 1863.

"DR. WYNN,

"SIR:

"I received yours of the 31st January, and was glad to hear from you and friends. I got your letter on Saturday, and answer it by the first mail. You say in your letter that you want me to come after my money. Well, sir, I will say to you that there is no chance to pass at this time. The waters are so high, and the Yankees in the way, that I can't pass, and don't know when I can, but will as soon as I can—I will do so. I don't want to injure the estate one cent, and you can get bonds of the Confederate States, and they will pay the interest, and there will be nobody injured; and if you can send it by any safe hand, why, do so, but not at my risk, and if not, hold it in your hands till I come.

"I am, sir, yours respectfully,

"ISAAC H. WEBB."

He also wrote to his daughter, Mrs. Sims, requesting her husband, Mr. Sims, to see the executor and have him to fund the money in Confederate States bonds; and Sims saw the executor accordingly and delivered this message.

The executor, immediately after receiving the foregoing letter addressed to him, purchased for Webb eight per cent. bonds of the Confederate States, amounting to \$2,500.00, which bonds he still has. Having so done, he proceeded to make distribution of the balance of the assets belonging to his testator's estate, reserving only enough to cover a sum in dispute between the widow and the other heirs. He, however, took refunding bonds from the distributees.

In 1866, Webb sued the executor on the notes, and the latter filed his bill to enjoin the action. The injunction was granted, and Webb (or his attorney, by consent,) answered the bill, and moved to dissolve the injunction. The grounds of the motion were:

1st. That there was no equity in the bill,—that the executor's defence was good at law, ample, and complete.

2d. That the equity of the bill (if any) was sworn off by the answer.

The Judge refused to dissolve the injunction, and this is alleged as error.

BURTS, for plaintiff in error.

RAIFORD, for defendant.

LUMPKIN, C. J.

Ought this injunction to have been dissolved? The fact that the Chancellor thought not, would be sufficient to control us in a case like this. As we have said in other cases, if his discretion has not been grossly abused, we should not reverse him. He had the whole matter before him, both the action at common law and the bill in equity. He did not go out of his Circuit to interfere with litigation not be-

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fore him, but with all the parties in his jurisdiction, he thinks it best to retain the bill. Perhaps the defence could be available at law; for, though not technically a plea of payment, nor of accord and satisfaction, yet I see not, under our Judiciary, which requires the party defendant plainly, fully and distinctly to set forth his cause of defence and submit his case to the jury—I say, I see no fatal obstacle in the way. He might not have encountered any difficulty in the proof; but why should the defendant in the bill object to the bill, as it calls for his answer, which he has filed, thus giving him the benefit of his own oath?

By the decree in equity, the notes can be delivered up and be canceled, and thus annoy Wynn's estate no more. This, too, can be done at common law; which, by its enlarged powers, granted to it by the Legislature, can so mould the remedy as to mete out justice to both parties. Suffice it to repeat, that Judge WORRILL, presiding in both Courts, thought it best to retain the bill; and, inasmuch as the case has progressed so far in equity, and there is not much more delay or expense in; one tribunal than the other, we do not see proper to control the Judge.

Judgment affirmed.

SUSAN W. LIVELY, plaintiff in error, vs. MARY A. PASCHAL, Administratrix of WILLIAM R. PASCHAL, deceased, defendant in error.

Notwithstanding dower is favored by the law, a wife may, by contract with her husband, founded on a just and fair consideration, relinquish all claim to dower in his estate. And if, after his death, she holds on to the consideration, Equity will enforce the contract, and she shall not have dower.

In Equity. In Putnam Superior Court. Bill praying

the assignment of dower. Tried before Judge A. REESE. September Term, 1866.

This bill was filed in August, 1862, by the plaintiff in error, against the intestate of defendant in error, to obtain dower out of the lands of which Lewis P. Harwell, a former husband of Mrs. Lively, the plaintiff in error, died seized; which lands Paschal, the defendant in the bill, claimed as a purchaser after Harwell's death from one acting as, and supposed to be, his executor. The fact that induced the demandant to proceed in Equity, rather than in a Court of law, was, that she, herself, was administratrix upon her said deceased husband's estate.

Harwell died in August, 1858, and the demandant claimed dower in these lands within one year thereafter, though the present bill was not filed until 1862.

The bill was defended on a single ground, namely, that the demandant's right to dower was barred by the acceptance of a provision in lieu thereof. The material facts bearing on this defence are the following:

Mrs. Lively, before her marriage with Harwell, was a Miss Fielder, daughter of Richard and Elizabeth Fielder. In 1835, after the death of Richard Fielder, Harwell executed the following:

"Received, Eatonton, February 18th, 1835, of E. Fielder, twelve bags of cotton, now in Augusta, which I have an order on, and made in full payment of all my interest in the property of my wife, which is coming to her after her mother's death from the estate of Richard Fielder; and, also, that part that will fall to her from the will of her grandmother, Amelia Berford. In witness whereof I have hereunto set my hand and seal." (*Signed by Harwell, and attested by two witnesses.*)

In 1841, the said Elizabeth Fielder, by deed of gift, conveyed to Joseph Johnson the legal estate in the property conveyed to her by the foregoing instrument, declaring in said deed of gift that "the proceeds and uses of which"

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(said property) "are for the sole benefit of the said Susan W. Harwell, for and during her natural life," and said property, "upon the death of said Susan W. Harwell, to be divided among her brothers and sisters, if said Susan W. shall die without child or children."

In 1851, commissioners appointed by the Ordinary to make distribution of the estates of Richard and Elizabeth Fielder, (the latter having died in 1850,) set apart to Harwell, as his share, in right of his wife, fourteen negroes, valued at \$7,725, with a charge thereon of \$31 25, in favor of another distributee.

In 1852, Harwell and wife executed the following :

"Georgia, }
 Putnam county, }

Whereas, by a recent division of the negro property of Richard Fielder and Elizabeth Fielder, of said county, deceased, the negroes hereinafter mentioned were assigned to Lewis P. Harwell, in right of his wife, Susan W. Harwell, as heir and distributee of the said decedents; and whereas, it has long been the intention and desire of the said Lewis P. Harwell, and still is his desire and intention, to vest the absolute ownership of all the negro property which has come or may come to his said wife by inheritance, in her, for her sole and separate use, without restriction by reason of the rights of said Lewis P. Harwell: Now, this indenture, made and entered into this ——— January, 1852, between Lewis P. Harwell, of said county and State, of the one part, and Susan W. Harwell, of the same place, of the other part; Witnesseth, that the said Lewis P. Harwell, for and in consideration of his natural love and affection for his said wife, Susan W. Harwell; *as well as in consideration that the said Susan W. Harwell has hereby relinquished, and does hereby relinquish, all her right, title and interest to dower in the lands of which said Lewis P. Harwell may die seized,* hath given, granted, bargained, sold, &c., and doth, by these presents, grant, bargain, sell, &c., unto his said wife, for her sole and separate use, the follow-

ing negroes, to-wit, (*describing them*,) together with the increase of said negroes, and whatever other negroes may come to said Susan W. Harwell by inheritance, with power on the part of said Susan W. to dispose of the same absolutely, and according to her will and pleasure, by her last will and testament, or writing in the nature of the same, at her death. Provided, however, that if said Lewis P. Harwell should survive his said wife, then said property shall remain to him, for his own use, during his natural life, and in such an event, all bequests, limitations and appointments of the same, by virtue of the powers herein granted, &c., to the said Susan W., shall take effect in possession in the said legatees, appointed, &c., who may be interested in the same, only after the death of the said Lewis P. Harwell." (*Signed and sealed by Harwell and his wife, and attested by two witnesses. Recorded May 19th, 1852.*)

To execute this instrument Harwell was extremely reluctant, and did so only after urgent importunity from the counsel of his wife, who, at her instance, *followed him up*, to get him to do it.

At the time it was executed a bill was pending (returned to March Term, 1851,) in Putnam Superior Court, filed by Harwell and wife against one Armstrong, as administrator of Fielder, and Joseph W. Johnson, trustee, praying for general relief, and for a decree against Johnson that the aforesaid receipt given by Harwell to Mrs. Fielder, be delivered up to be cancelled.

In 1856, certain arbitrators, to whom this bill was referred, made their award, directing that the negroes mentioned in the foregoing papers "continue in the possession of the said Lewis P. Harwell and his wife for and during their joint lives, for their joint use, and in the event of the said Lewis P. surviving his said wife, then to be the property of said Lewis P. for his life, and after his death, to go to such persons as said Susan W. may, by deed or will, appoint, she being hereby vested with a full and absolute property in said negroes after the death of Lewis P. Har-

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well," &c. This award was made the judgment of the Court.

After the death of Harwell, his wife remained in the possession and use of said negroes until they were emancipated.

The Court charged the jury as follows :

"The bill filed on the 17th of February to March Term, 1851, by Harwell and wife against Armstrong, administrator, and Johnson, Trustee, in my judgment, is not a bill to settle wife's equity. The object of the bill seems to have been to cancel the receipt of 1835, and the conveyance of 1841, and the decree, or award, therein, virtually cancels them, as the award settles the property with different limitations and conditions. And you may look to the language used in the contract of 1852, and compare it with the language used in the award, and if you find the settlement to be substantially the same in language and in conditions, you may infer it was the object of the award to confirm the settlement of 1852.

"A provision made by deed, expressly in lieu of dower, or where the intention of the husband is plain and manifest that it shall be in lieu of dower, and the wife so accepts the property so provided, after the death of the husband, she is barred of dower.

"Whilst the law protects the wife during coverture from all contracts made with her husband, it does not allow her, after the death of her husband, to avail herself of the benefits of a contract made during coverture, without being bound by the terms of the whole contract.

"If you believe, from the evidence, that complainant, after the death of her husband, accepted the property conveyed by the contract of 1852, under that contract she is barred of dower, for the reason that the contract contains an express relinquishment of her dower in all the lands of which he might die seized or possessed. * * It would be a fraud upon an innocent purchaser without notice of a repudiation of the contract, to allow her to recover dower."

After a verdict against the demandant, she moved for a new trial on the grounds:

1-2. Because the verdict was against law and evidence, and strongly against the weight of evidence.

3-4-5-6-7. Because the charge of the Court was erroneous.

The Court overruled the motion, and refused a new trial, and that is assigned as error.

MCKINLEY, for plaintiff in error.

LAWSON, for defendant.

HARRIS, J.

The many and strong cases cited and read by counsel for plaintiff in error, illustrate unmistakably the leaning of Courts in behalf of widows in claims to dower. We are not willing to add another, at least this case, to the long catalogue which evinces so palpably the weakness of even the Bench when a woman is a suitor. She is in a Court of Equity; the fundamental maxim upon which it gives relief is, that the party who asks equity must do equity. Acting on this rule, we must discard and throw out of this case all of these arbitrary technicalities which stand in the way of administering substantial justice. What though at common law a contract cannot be made between husband and wife; what though the written contract here on the part of complainant releasing all claim to dower in lands thereafter to be acquired by the husband could not be enforced by its principles and forms of procedure; yet, when it is made to appear to a Court of Equity, as is done here, that a very large and more than an adequate consideration was paid complainant by her then husband, Harwell, out of his property for such release, and that so far as he was concerned the contract was completely executed before the civil war begun, we cannot permit, her, now that

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the negro property which she received, controlled, and enjoyed long before that war begun or was dreamed of, has been swept away and utterly lost to her by that war, to repudiate her contract with her husband, Harwell; tendering no equivalent in value to that of the property she had possession of through her trustee; such tender with interest upon the value of the property from the time received, would seem to be an indispensable preliminary to the relief sought. Without doing Equity we cannot recognize any claim of dower in and to land acquired by Harwell subsequent to the contract she made with him, and which the testimony shows she was so indefatigable in procuring to be made, and under the advice of counsel of her own selection.

The Court of Equity below, as appears by the facts in the record, declined to give Mrs. Lively, formerly Mrs. Harwell, its assistance in subjecting the land purchased by Pascal from Harwell's executor, to her claim of dower.

We think the Judge did right, and therefore affirm the Judgment below.

WILLIAM GIBSON, (a person of color,) plaintiff in error, vs.
THE STATE OF GEORGIA, defendant in error.

[1] Crimes are punishable by the laws in existence at the time of their commission.

[2] A person of color is not indictable in the Superior Court for larceny from the house committed prior to the Act of 17th March, 1866. *Pamph. Acts p. 289.*

Motion to Quash Indictment. In Upson Superior Court. Decided by Judge SPEER. November Term, 1866.

The plaintiff in error was indicted in the Superior Court, at November Term, 1866, for the offence of Larceny from the House, alleged to have been committed on the 3d day of

February, 1866. His counsel moved to quash the indictment, on the ground, that at the time alleged, persons of color were triable, for the offence charged, before Justices of the Peace, and not before or by the Superior Courts.

The Court overruled the motion, and that is alleged as error.

CABANISS & PEEPLES, for plaintiff in error.

HAMMOND, (Solicitor General,) for the State.

WALKER, J.

[1] By the *Code*, Sec. 4550, "All crimes and offences committed shall be prosecuted and punished under the laws in force at the time of the commission of such crime or offence, notwithstanding the repeal of such laws before such trial takes place."

[2] The offence in this case was charged to have been committed on the third day of February, 1866. At that time the tribunal which had jurisdiction of this case was composed of "three or more Justices of the Peace of the county where the offence was committed." *Code*, Sec. 4724; with the right of either party to carry the decision before the Superior Court by *certiorari*. Sec. 4727. The punishment on conviction of larceny is to be in the discretion of the Court before which the trial is had. Sec. 4714 and 4718. By the Act of 17th of March, 1866, *Pamph. Acts p. 239*, persons of color "shall not be subjected to any other, or different punishment, pain or penalty for the commission of any Act or offence than such as are prescribed for white persons committing like acts or offences." The effect of this statute is to make persons of color equal before the law with white persons, and liable to the same penalties for crimes; but such was not the case prior to the passage of this act. At the time of the commission of this offence, there was no law which authorized the confinement of the plaintiff in error in the penitentiary for the crime of larceny from the house.

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The indictment showed that the charge of larceny from the house, was made against a person of color, committed on the 3d of February, 1866, and consequently showed all the facts necessary to oust the Superior Court of jurisdiction of the case, and therefore the Court should have sustained the motion to quash the indictment.

Judgment reversed.

THE GEORGIA LAND AND COTTON COMPANY, plaintiffs in error,
vs. THOMAS J. FLINT, defendant in error.

In this case, the award was correct, whether the contract for stipulated damages made a case of penalty or not, as the actual damage proven was as much as the sum awarded.

Award. In Dougherty Superior Court. Decision by Judge COLE. June, 1866.

On the 3d day of January, 1866, Thomas Flint, of the one part, and P. H. Oliver, as agent of the Land & Cotton Company, limited to be chartered, of Manchester, England, made an agreement in terms as follows :

Flint had purchased, at different sales of Moughon's estate, 1,250 acres of land, in Second District of Lee county, known as the Lee place, for \$12.50 per acre; also other places, mules, corn, fodder, pork, hogs, plantation tools, etc.

Oliver became the purchaser of all this property of Flint, agreeing to pay him in cash, within ten days after the date of the agreement, \$3.750, as a profit on the land, and to become responsible to Moughon's administrators in Flint's stead.

Both parties agreed upon \$4.000, as stipulated damages

to be paid by the party failing to comply with the agreement.

The \$3.750 profits were not paid at the time agreed upon, and Flint claimed the stipulated damages. They referred the controversy to the sole arbitrament and award of William E. Smith. The submission is substantially as follows:

“We agree to submit, under the laws of this State, the following questions for arbitration, to-wit: Whether said contract was fully complied with by the parties, and what are the damages due upon the failure of either party to said contract, by law, under the terms and stipulations in said written contract.”

The evidence given in on the trial, consisted of the written agreement and the following agreed facts.

On the 23d of January, 1866, the principals went with Mr. Flint to the administrators of Thomas Moughon, and adopted the contract of their agent; gave notes and mortgages for the credit payment for the land, after taking title therefor, and gave Flint a draft on I. C. Plant, at Macon, at sight, for \$3.750, the profit contracted for. The defendants, also, gave Flint a sight draft on Plant for \$16.308, making an aggregate of \$20.058. Five thousand dollars of these drafts, transferred by Flint to parties in Albany, were paid by defendant. The balance were presented to Mr. Plant, and not paid, because by mistake of Oliver, agent, no funds had been furnished for that purpose.

Flint did not get the money on these drafts until the 4th of March, 1866, and then it was agreed that receiving it at that time should not be regarded as a waiver of his right to damages under the contract.

During the time Flint was kept out of his money, money was very scarce and high at Macon—as high as five per cent. per month. Flint proved by his own oath that he was damaged over four thousand dollars, in his business and loss of trades which he had to give up by the disappointment; that he told Oliver when the trade was made that time was material, to which Oliver assented.

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It was stated by the draftsman of the contract, that the parties agreed that as the country was in an unsettled state, and the price of property very fluctuating at the time of the trade, the written contract should stipulate the amount of the damages, and the draftsman was so instructed, and so endeavored to draw it.

The arbitrator found for the plaintiff \$4.000

On a motion in the Superior Court to make the award the judgment of the Court, plaintiffs in error objected, on the ground that it was founded on a mistake of the law and the facts of the case. The motion was granted, and plaintiffs in error excepted.

VASON & DAVIS for plaintiffs in error.

WRIGHT & WARREN, for defendant in error.

LUMPKIN, C. J.

Without deciding whether the condition of the agreement was, in fact, stipulated damages or a penalty, there is one view of this case decisive upon the question. Mr. Flint was sworn on the arbitration, and testified that his damages were more than \$4.000, for want of punctuality on the part of Oliver to settle; and there was no contradictory evidence to rebut this proof. So, whether we consider this as strictly a case of stipulated damages, or only a forfeiture, the result is the same, as the actual damage is proven to have exceeded this sum.

The judgment, must therefore, be affirmed.

ROBERT A. ALSTON, plaintiff in error, vs. VOLNEY DUNNING,
defendant in error.

Summons of garnishment, founded on attachment, may issue after the return Term of the attachment, and without additional affidavit and bond.

Certiorari. In Fulton Superior Court. Decided by Judge WARNER. October Term, 1866.

Alston sued out an attachment against the Adams Express Company, returnable to the March Term of a Justices Court. It was levied upon two wagons, and a claim was interposed by the Southern Express Company. It was further executed by serving Dunning and two others, each with summons of garnishment, returnable to the same Term. These garnishments were, at said Term, to-wit, on the 9th of March, dismissed by the Court for insufficient service. Thereafter, to-wit, on the 26th of March, the plaintiff in attachment, without making any further affidavit or bond, sued out on the same attachment, new summons of garnishment returnable to the April Term of said Court, and addressed to the same garnishees.

At June Term a verdict was rendered in favor of the plaintiff against the defendant in attachment, and the same jury tried the claim case and found the wagons not subject.

At July Term, the garnishees moved to dismiss these second garnishments, on the ground that such could not legally issue. The Court overruled the motion, and Dunning, one of the garnishees, carried his case, by Certiorari, to the Superior Court, all parties consenting that the other cases should abide the result of his.

In the Superior Court, the Certiorari was sustained; the Court holding that the magistrates should have dismissed the second garnishments, because issued without affidavit and bond, as in cases *pendente lite*.

This is the ruling complained of.

MYNATT, for plaintiff in error.

HAMMOND & SON, for defendant.

WALKER, J.

We think the Court erred in holding that, after the appearance term of an attachment, the plaintiff must sue out a summons of garnishment as in cases *pendente lite*, i. e. make out a new affidavit, give new bond, etc. We apprehend that the error occurred in construing the 3215 *Section of the Code*. That section makes it the duty of the officer issuing an attachment, on request of the plaintiff, to issue summons of garnishment returnable "*at the Court to which the attachment is made returnable.*" We do not think that these words make the summons necessarily returnable at the *term* of the Court to which the attachment is made returnable; but intended to compel the plaintiff to bring the garnishee into the same Court, where the attachment is pending. If this be not the correct view of the statute, it may be a question, whether a summons of garnishment can be issued at all, in an attachment case, after the appearance term; for sections 3461-2 of the *Code* might, perhaps, be construed to apply to cases *in personem* only. Without expressing any opinion on this point, however, we will say, we can see no good reason for requiring the plaintiff to make a second affidavit and bond in a case like this. The condition of the attachment bond, *Sec. 3190*, and the condition of the garnishment bond, *Sec. 3462*, are substantially the same. The defendant, then, can sustain no injury, because he has, in the attachment bond, the security which the law gives him under the garnishment bond, against the wrongful suing out of the summons of garnishment.

Again, the plaintiff shall not have judgment against the garnishee until he has obtained judgment against defendant; *Code, Sec. 3471*. This summons was returnable to the judg-

ment term of the attachment, and was as early as a judgment could have been rendered against the garnishee any how.

Judgment reversed.

CALEB THOMPkins, plaintiff in error, vs. WILLIAM DAVIS, defendant in error.

No appeal lies to the Superior Court from a Monthly Term of the County Court.

Motion to Dismiss Appeal. In Bartow Superior Court. Decided by Judge MILNER. October Adjourned Term, 1866.

This was an appeal in a case of debt, tried by jury in the County Court, at a monthly session. In the Superior Court, counsel for the appellee moved to dismiss the appeal, on the ground that the appellant had no legal right to enter an appeal to the Superior Court in such a case, and the latter Court had, consequently, no jurisdiction.

The Court dismissed the appeal, and this is complained of as error.

WOFFORD & PARBOTT, for plaintiff in error.

AKIN, for defendant.

LUMPkin, C. J.

The only point involved in this case, is, whether an appeal lies from the monthly sessions of the County Court to the Superior Court? We think not. The word appeal is used but once, and that in the 12th Section of the Act or-

ganizing the County Court, and the whole Section applies only to the semi-annual sessions of that Court. *Acts* 1865-6, page 66.

In the semi-annual session, cases are commenced, served and tried as in the Superior Courts; but in the monthly sessions, as in the Justice's Courts. *Sec.* 24, page 68.

The trials of claims and attachments in the monthly sessions, shall be the same as in Justice's Courts; but in the semi-annual sessions, the same as in the Superior Courts. *Sections* 32-3. There is no appeal allowed from Justice's Courts to the Superior Courts.

Can there be any reason assigned for allowing an appeal from a verdict of a jury at the monthly sessions, where a suit is brought in the ordinary way, and not allowing it in a claim case or attachment?

The whole Act shows that it was the intention of the Legislature to facilitate the collection of small debts; but if appeals are to be allowed on every \$5 note or account, expense and delay will be greatly increased.

Judgment affirmed.

CHARLES BROWN, a person of color, plaintiff in error, vs.
THE STATE OF GEORGIA, defendant in error.

A person of color is not indictable in the County Court for the offence of larceny committed on the 30th of November, 1865.

Certiorari. Decided by Judge Hook. At Chambers.
July, 1866.

The plaintiff in error was indicted in the County Court of Jefferson, at July Term, 1866, for the offence of simple lar-

ceeny, committed on the 30th day of November, 1865, by stealing a hog, of the value of ten dollars.

His counsel moved to quash the indictment on the grounds :

1. That the Court had no jurisdiction.
2. That crimes must be prosecuted and punished under the laws existing at the time of their commission.
3. That a larceny committed by a negro on the 30th of November, 1865, must be tried by three Justices of the Peace.
4. That the penalty is changed by the Act of March 20th, 1866.
5. That by the Act of March 17th, 1866, the status of negroes is changed, and they are made liable to the same punishments as white persons.

The Court overruled the motion, and that decision, with some others, was complained of to Judge Hook by certiorari.

Judge Hook affirmed the judgment below, and that is now complained of as error.

WILKINS & CAIN, and TOMPKINS, for plaintiff in error.

CARSWELL & KING, for the State.

WALKER, J.

The judgment in this case is reversed, for the reasons given in the case of *Gibson vs. The State*, decided during the present term.

Hendrick vs. Gunn.

GUSTAVUS HENDRICK, plaintiff in error, vs. **JESSE T. GUNN**,
surviving copartner, defendant in error.

L. & G. entered into the following articles: "It is agreed between the parties Cornelius Lummus have the right to use the name of each other as a firm name; and I, the said Jesse T. Gunn, do grant that C. Lummus have the right to go to any of the wholesale markets and purchase goods, and sell the same at the house and place known as Worthville; and I, Jesse T. Gunn, do this for the benefit of C. Lummus, not claiming any of the profits arising from the sale of any goods or articles sold at the above named place. And all money furnished to enable the said firm. Lummus & Gunn, to each other, shall be held at the rate of seven per cent."

Held, that this agreement constitutes L. & G. partners.

Certiorari. In Butts Superior Court. Decided by Judge **SPEER**. At Chambers. October, 1866.

The question made by this certiorari was, whether the following instrument created a partnership between the parties thereto, under the firm name of Lummus & Gunn, so as to enable Gunn, after the death of Lummus, to sue for debts as surviving copartner. It was admitted that they held themselves out to the world as partners, and did a mercantile business in the firm name of Lummus & Gunn.

"Georgia, }
Butts county, }

"Articles of agreement between Cornelius Lummus, of said county, and Jesse T. Gunn, of said county, this, the 16th of November, 1859. It is agreed between the parties Cornelius Lummus have the right to use the name of each other as a firm name; and I, the said Jesse T. Gunn, do grant that C. Lummus have the right to go to any of the wholesale markets and purchase goods and sell the same at the house and place known as Worthville; and I, Jesse T. Gunn, do this for the benefit of C. Lummus, not claiming any of the profits arising from the sale of any goods or articles sold at the above named place; and all money furnished to enable the said firm, Lummus & Gunn, to each other, shall be held at the rate of seven per cent. Signed in the presence of each other, and the above to exist for the term of two years.

Test: J. W. SWANN."

C. LUMMUS,
JESSE T. GUNN.

The suit carried up by certiorari was brought in the County Court by the defendant in error, as surviving co-partner, against the plaintiff in error, on an account in favor of Lummus & Gunn.

The County Court having awarded a non-suit, on the ground that there was no partnership, the Superior Court, on hearing the certiorari, reversed that judgment; and this reversal is now complained of as error.

DOYAL & NUNNALLY, for plaintiff in error.

HALL & THURMAN, for defendant.

LUMPKIN, C. J.

This case all turns upon the construction of the articles of partnership drawn up between Lummus and Gunn. Does this constitute them partners? If so, of course Gunn, as survivor, has the right to collect the assets and to discharge the liabilities of the concern.

We answer, they traded by agreement under the firm name of Lummus & Gunn, thus holding themselves out to the world as partners. Lummus was authorized to purchase a stock of goods in the firm name in any wholesale market, and dispose of them at retail at Worthville. Each is to be paid interest on cash advanced to the firm; and, in fact, we do not see room to doubt the character of this contract. It has not all, to be sure, but most of the elements that enter into every contract of this kind. Gunn is not to participate in the profits, but he is liable for the losses.

We cannot do otherwise than affirm the judgment of the Court below.

Judgment affirmed.

Comas vs. Reddish.

JACOB COMAS, (a person of color) plaintiff in error, vs. ISHAM REDDISH, defendant in error.

[1.] The Ordinary has no power to apprentice a colored child who resides with and is maintained by its father, the father being a resident of the county and able to support the child.

[9.] The Act of 1866, touching apprentices, construed.

[8.] If a child not subject to be so dealt with, be bound out by the Ordinary, the indentures of apprenticeship will form no obstacle to restoring the child to its parent by writ of *Habeas corpus*

Habeas Corpus. Tried before Judge Sessions. September, 1866.

The plaintiff in error, while a slave, took for his wife another slave, his owner and hers both consenting, and recognized her as such for many years; during which time she bore five children, one of whom was a boy, Henry, now thirteen or fourteen years old. He then abandoned this woman, and took up with another; after which, the mother of Henry died. Henry became the slave of the defendant in error, and after emancipation, remained with him until about September, 1865, when he left and went to the plaintiff in error, claiming and recognizing him as his father. From that time forth he resided with his father in Appling county, and was, by his father, (a man of good character for honesty, industry and morality, and abundantly able to support his family,) kept and maintained.

In May, 1866, the Ordinary of Appling county, without the knowledge of Henry or of his father, bound out Henry to the defendant in error, as an apprentice; and indentures of apprenticeship were executed by the Ordinary and the defendant in error, in which the Ordinary recited, as the grounds of his action, that it had been made to appear to that Court that Henry was without any parent residing in that county, and without means for his support and education.

At the time this was done, Henry's father was, in fact, residing in the county, and Henry with him; and it remained

thus until September following, when the defendant sued out a writ of *habeas corpus* to acquire the custody of Henry.

At the hearing of the writ, Judge Sessions held that as the indentures of apprenticeship were executed by a Court of competent jurisdiction, he could not set them aside; and he therefore awarded the custody of the boy to the defendant in error.

This judgment is complained of.

GAULDEN, for plaintiff in error.

NICHOLLS, for defendant.

HARRIS, J.

The Act of the Legislature of Georgia, approved 17th March, 1866, entitled, An Act to alter and amend the laws of this State in relation to apprentices, was evidently designed to make provision for that large class of persons in our midst (colored minors) who, by the results of the civil war, have been thrown upon society, helpless from want of parental protection, want of means of support, inability to earn their daily bread, and from age and other causes. It was the imperative duty of the Legislature to make provision for this portion of our people, to give them the full protection of the law, and prevent their becoming burdensome upon the industry of the country.

The spirit of this act is wise, just, and humane, and comprehends, alike, the white and black, without discrimination. It is, moreover, clear and perspicuous, and should be enforced in good faith; and under color of its provisions, public functionaries should be vigilant in preventing any one, under the name of master, from getting the control of the labor and services of such minor apprentice, as if he were still a slave. It should be borne always in mind, and at all times should regulate the conduct of the white man, that slavery is with the days beyond the flood; that it is prohibited by

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the Constitution of the State of Georgia, and by that paramount authority, the Constitution of the United States; and that *its continuance will not by any honest public functionary be tolerated, under the forms of law or otherwise, directly or indirectly.*

The Act referred to never contemplated the apprenticing of a colored minor whose father or mother were alive, resident in the same county of the minor. When the parents are dead, and the profits or income of their estate are insufficient for the support of the minor, then, and in such case, the Ordinary may bind out the minor as an apprentice. So, also, when the parents of a minor reside out of the county in which he resides, and their means are insufficient for his support, the Ordinary may apprentice the minor. The law further enacts, that in all cases where the parents are, from poverty, infirmity, from disease or old age, unable to support their minor children, the Ordinary is authorized to bind out the minor children of such parents.

The testimony in the record, not simply shows an entire want of jurisdiction of the Ordinary in this case, but the strongest reasons why he should not have yielded to the wish of Reddish to have the boy Henry apprenticed to him.

Let the judgment be reversed.

TENDERSON SMITH, Executor of James Langford, deceased,
plaintiff in error, vs. SAMPSON BELL, defendant in error.

[1] A plaintiff, by paying cost, present and future, into Court, and assigning all his interest in the case, may become a competent witness.

[2] Such assignment may be complete by depositing in Court the instrument making it, in the absence of the assignee, whose acceptance will be presumed.

Action. In Webster Superior Court. Tried before Judge CLARKE. September Term, 1866.

The plaintiff is the Executor of the will of James Langford, deceased. At an Executor's sale, early in the year eighteen hundred and fifty-five, Henry Weaver purchased two negroes, at the price of thirteen hundred dollars. The terms of sale were credit till Christmas thereafter, with two securities.

Suit is now brought to hold the defendant responsible on his promise to stand Weaver's security.

McINTOSH, February 3d, 1855.

MR. TENDERSON SMITH, ESQ. :

Sir—If Henry Weaver should purchase any of the negroes of Langford's estate, I expect to stand his security, if he desires it, and will be taken, and I shall not be present on your sale day, but will attend to it at any time.

Yours, with respect,

SAMPSON BELL.

The plaintiff offered himself as a witness to prove that he demanded of Bell to become the security of Weaver. The defendant objected, on the ground that the plaintiff was interested in the event of the suit. Plaintiff showed a receipt from the Clerk of the Court for fifty dollars, for all costs that had, or might accrue—a release, signed by himself as Executor, to himself as an individual, from all costs that had, or might accrue—a release, by himself as Executor, to the legatees under the will, from all commissions or other charges on account of any recovery in this case; also a release from Blanford & Miller from all liability for attorney's fees in this case; and proved that he had settled in full with all the legatees, except Benjamin M. Langford. As to him, plaintiff assigned to one Tullis, his administrator, all interest he might have, by reason of any recovery from Bell in this case. This assignment was subsequent, in point of time, to the objection to the competency of the witness, and was made without the knowledge or acceptance of Tullis.

Plaintiff also read an exemplification of an Equity case in

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Marion Superior Court, wherein Tullis, as administrator, was plaintiff, and Smith, as executor, defendant, for the recovery of his intestate's distributive share of the estate of James Langford, deceased, and a decree therein in favor of Smith.

The Court sustained the objection to the competency of the witness, on the ground that he might be liable to the legatees of James Langford, deceased, and plaintiff in error excepted.

BLANFORD & MILLER, for plaintiff in error.

McCAY & HAWKINS, for defendant.

LUMPKIN, C. J.

The only question in this case is as to the competency of Smith as a witness. That he was originally disqualified, both as party plaintiff, and on the ground of interest, may be conceded. The question is, has he taken such steps, as to restore him to competency. He has deposited with the Clerk money sufficient to discharge past cost, and to cover any future cost. He has released the defendant from liability for cost. He has settled in full with the legatees of Langford's estate, even to the including of the note, which is the subject of this controversy. The paper as it now stands is his. He has assigned his interest in the claim to Tullis, adm'r. of Langford. The Court still rejected him. Is he competent? We think so. *Code, Sec. 3785.*

We doubt not, before this Court again sits in this capital, if it ever does, all this machinery to qualify a party to swear, on account of his interest, will be done away with, and probably the defendant, as well as the plaintiff, will be entitled to his oath. This is my hope, at least. No State in the Union has taken a step backward which has tried the experiment; neither has England; thus demonstrating by experience that progress in this direction works well.

Judgment reversed.

DANIEL FARRIS, (a person of color,) plaintiff in error, vs.
THE STATE OF GEORGIA, defendant in error.

- [1] Error cannot be assigned on the verdict, as contrary to evidence, unless a motion for a new trial was made in the Court below.
- [2] The Court need give in charge to the jury only that portion of the law of homicide made applicable by the facts to the case.
- [3] The omission to charge a clause of the Code which could not benefit defendant, is no ground for complaint by him.
- [4] If the Court omit anything in charging the jury which is deemed material, counsel should suggest such additional charge as may be desired.
- [5] This Court will not control the discretion of the Court below in imposing penalties for crimes, unless in cases of flagrant abuse. Whether such discretion is subject to control at all, when exercised within the limits prescribed by statute? Query?

Assault, with intent to Murder. In Marion Superior Court. Tried before Judge WOERRILL. September Term, 1866.

The plaintiff in error was found guilty and sentenced to the penitentiary for ten years. He made no motion in the Court below for a new trial.

His counsel argued to the jury that they were judges of the law as well as of the facts, but did not request the Court so to charge, and the Court gave no charge on that subject.

The errors assigned in the Supreme Court are, that the verdict was contrary to evidence and the weight of evidence; that the Court did not give in charge the several grades of homicide; that the Court gave a portion of *section 4230 of the Code* in charge, and omitted to charge that part reading as follows: "And it must appear, also, that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given;" and that the sentence of the Court was for a longer term of imprisonment than the facts of the case demanded.

HINTON and ELAM, for plaintiff in error.

PEABODY, Solicitor General, for the State.

WALKER, J.

[1.] No motion for a new trial having been made in the Court below, this Court cannot consider whether the verdict was contrary to the evidence or the weight of evidence or not.

[2.] The third ground of error complained of is, that the Court did not give in charge the several grades of homicide. In looking into the bill of exceptions, we are satisfied that the Court charged upon the several grades of homicide so far as the facts in the case were applicable. This is all that was necessary. *Keener vs. The State*, 18 Ga. R. 230.

[3.] The omission of the Court to give in charge the latter portion of *section 4230 of the Code* is complained of. For what reason, we are unable to understand. No sufficient one was suggested why the *plaintiff in error* should complain of such omission; for that certainly could not have benefited him. But, in relation to both of these grounds of complaint, we have to say that no request was made of the Court to give in charge the several grades of homicide, or the omitted portion of *section 4230*.

[4.] It is the duty of counsel, if they think the judge has omitted anything which should be given in charge, to call his attention to such omission, and thus procure his decision upon the question whether it should be charged or not. In this way the question can be much more properly considered by this Court. The last ground of error is stated in these words: "Because the Court, in the exercise of a discretionary power, imprisoned for a greater length of time than the facts of the case demanded." It is not pretended that the Court exceeded the time allowed by the statute, but that, under the facts of the case, the plaintiff in error should not be so long confined in the penitentiary as the time imposed by the Judge. Whether a case might possibly be presented in which this Court would control the discretion of the Court below, as to the penalty imposed upon one convicted of crime, it is unnecessary now to decide. The inclina-

tion of our mind is against the power to review such action. We are inclined to hold that the imposition of penalties, in most cases, is by law devolved upon the Courts below, to be exercised according to their discretion, limited by the law-making power within certain bounds. Waiving this point, however, we are satisfied that the discretion in this case was properly exercised, and we feel no disposition, if we had the power, to control it.

Judgment affirmed.

G. S. MANDEVILLE, plaintiff in error, vs. JAMES F. MANDEVILLE et. al., defendants in error.

[1.] Where one petitions the Ordinary for letters of administration and prays that a citation be issued, and a caveat is filed by the heirs at law, and this, by consent of parties, is tried, and the Ordinary's judgment is against the petitioner, and the latter appeals therefrom to the Superior Court, it is too late, when the cause is before the jury on the appeal trial, for the petitioner to call in question the regularity of his original application and the due publication of citation founded thereon. He is estopped from so doing.

[2.] Letters of administration may be denied the original applicant, and be granted to another person; and to do this, no fresh citation is necessary.

[3.] Where a majority of the next of kin select, under the Code, a fit person for administrator, the Ordinary must appoint him.

Caveat. In Clay Superior Court, on appeal from the Ordinary. Tried before Judge CLARKE. June Term, 1866.

On the first day of September, 1865, G. S. Mandeville, applied to the Ordinary of Clay county, to issue a citation of his intention to administer on the estate of Charles G. Mandeville, formerly of said county, deceased.

On the 2d day of October, 1865, the defendants in error, six of the heirs at law, and two-thirds of those interested in the distribution of the estate, filed their caveat to the granting of letters of administration to the petitioner, on the grounds:

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1. Because each of the caveators is as much entitled to administration of the estate, as the applicant; and they object to him for reasons which have recently transpired in a partial division of the estate by consent.

2. Because all of the caveators select and prefer James F. Mandeville, a son of the intestate, and a distributee of his estate, as administrator.

At the March Term, 1866, of the Court of Ordinary, the parties agreed, in writing, that the case be tried before the Ordinary.

The Ordinary awarded letters to James F. Mandeville. G. S. Mandeville entered an appeal.

On the trial counsel for plaintiff in error requested the Court, in writing, to charge as follows:

"If it appear by the testimony of the Ordinary that granted the letters of administration (the record being silent on the subject) that no application for letters was made to him, and that no citation was published according to law, then, the letters were illegally granted."

The Court refused to charge as requested, but did charge:

"If you are satisfied, from the evidence, that the counsel for Gerard S. Mandeville and for the caveators entered into a written agreement that the case (caveat) should be tried before the Ordinary, then, by virtue of that agreement, the Ordinary might proceed to decide upon the application of Gerard S. Mandeville, and upon the whole subject of appointing an administrator, whether there had been any legal citation or not; such agreement would amount to a waiver of the preliminary steps by which the application is usually brought before the Ordinary, and Mandeville, who consented to have his application tried, cannot now object that his application was not properly before the Court;" and counsel for plaintiff in error excepted. The jury returned a verdict in favor of James F. Mandeville, caveator.

Plaintiff in error moved for a new trial upon the grounds:

1-2-3. That the verdict was contrary to law; contrary to

the evidence ; decidedly against the weight of evidence ; and without evidence.

4-5. Because of the refusal of the Court to charge as requested, and of the charge as given.

The Court overruled the motion, and plaintiff in error excepted.

DOUGLASS, APPLING and HOOD, for plaintiffs in error.

TURNIPSEED, for defendants.

HARRIS, J.

[1] In looking through the record in this cause, we are unable to perceive the shadow of a reason for this Court being troubled as it has been by the litigious spirit which characterizes the conduct of plaintiff in error in this whole matter.

He was an applicant, as it appears by his petition, to the Court of Ordinary of Clay county for letters of administration on his father's estate, and prayed therein that a citation should issue, calling on distributees and others interested, to show cause why they should not be granted to him. In October thereafter, six of the heirs at law, standing in equal degree of relationship to intestate with himself, filed, in writing, their caveat against the grant to him of administration on their father's estate, for reasons therein stated ; and in that paper they allege that they prefer, select and make choice of James F. Mandeville, defendant in error, one of the sons of intestate, as most suitable and best qualified to receive letters and administer on the estate. This caveat, amongst other things, recites that " the citation of the late Ordinary, at the instance of Gerard S. Mandeville, *having been published in the ' Outhbert Reporter,' calling upon, etc., etc.*"

At the March Term, 1866, of the Court of Ordinary, we find an agreement stated thus : " Gerard S. Mandeville, ap-

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plicant for letters of administration on estate of C. S. Mandeville vs. Nancy Mandeville, and other caveators. We, the undersigned, by our attorneys at law, do agree and consent that the above stated case be tried before John C. Wells, Ordinary of said Court."

Signed for the parties by their respective attorneys.

In the face of these facts appearing in his transcript of the record, the plaintiff in error now says there was no application for administration—no citation published by the Ordinary—and gravely asks this Court to pronounce the grant of administration to Jas. F. Mandeville illegal, "*as the record is silent on the subject*;" that is, that the record does not show an application for administration, and the issue and publication of a citation by the Ordinary. Silent indeed! The record shows that *he* applied for administration; it shows, by his agreement to try the merits of his application and caveat to it, *his* admission that a citation, at *his* instance, was published. That citation produced the caveat—the caveat filed made an *issue*—a suit—and the agreement referred to recognizes a regular suit by the statement of the case—its nature—and by the provision for a trial of that suit by Mr. Wells, who, having been previously an attorney at law for one of the caveators, would have been disqualified to sit as Judge but for that consent.

The plaintiff in error is most clearly estopped by these acts and admissions from questioning here the legality of the proceedings of which he complains.

[2.] The law does not prevent or prohibit administration from being granted to any one but upon his *direct personal* application, and the issue and publication of a citation accordingly. On the contrary, to avoid delay and other inconveniences which such a course would occasion, it distinctly authorizes, whenever there has been an application and citation published, that the Ordinary may grant administration to a person other than the applicant. It does not require a new application—a new citation, See *Code* p. 472, section 2464.

This provision of the Code is an answer to the objection that Jas. F. Mandeville made no application for administration, and that no citation, at his instance, was published.

[3.] Again, why does the plaintiff in error, with such vexations and bootless pertinacity, continue the struggle for the administration? A majority of the heirs and next of kin in this case, and interested in the estate, and capable of expressing a choice, having, in writing, selected and made choice of their brother, Jas. F. Mandeville, the Ordinary was required by law to appoint him. *In such case, the Ordinary has no discretion whatever. See Code, p. 471, section 2461.*

The Ordinary did right in appointing Jas. F. Mandeville, and the special jury trying the appeal did right in confirming the judgment of the Ordinary; and, perceiving no material error in the Circuit Judge, in his refusal to charge as desired by the plaintiff in error, or in the charge given to the jury, we have no hesitation in affirming the judgment rendered.

Judgment affirmed.

ELIAS GARRIS, plaintiff in error, vs. THE STATE OF GEORGIA, defendant in error.

[1] The charge of the Court was not on an assumed state of facts, but upon the evidence.

[2] The evidence showed a wrongful taking by the prisoner.

[3] The evidence showed that the prosecutor was deprived of the possession.

[4] There was more than an attempt to steal; the larceny was consummated. It is immaterial that prisoner held possession but a short time.

Simple Larceny. In Dougherty Superior Court. Motion for new trial. Decided by Judge COLE. June Term, 1866.

Evidence submitted by the State.

Turner A. Cleaves, says: He knows the prisoner—first

saw him the forepart of the day the horses were stolen. About two months since they passed witness' house; on returning, stopped at witness' house, as his hands were going to work; appeared to watch the mules particularly; proposed to sell witness a mule; witness did not want the mule, as he knew it; saw them talking with the boy Lewis; soon they left, and Lewis went to his work.

Witness had a sorrel horse, and a dark colored horse mule taken from him. The mule worth \$225, and the horse \$125. After witness saw the man in consultation with Lewis, witness sent over to Albany after the Sheriff, who came about dark, and went down to the bridge and saw the horse and mule in possession of the prisoner and another. They had taken the harness off of their own mule, and were putting it on witness' mule, and were about hitching witness' mule to the buggy. When we went up, Mr. Kemp caught prisoner by the collar; took him and carried him to jail. The mule belonged to witness. This transaction occurred on the 6th day of April, 1866, in the county of Dougherty.

Cross-examined.—The mule and horse were taken from witness' lot. Did not oppose or give his consent to the mule going out of his lot. Told the negro that he should have nothing to do with the matter, one way or the other. Saw the mule after he was taken out of the lot, in possession of the prisoner; followed the walk of the horse and mule going down the road. Told the negro, he, witness, should have nothing to do with his taking the mule. Witness said to the negro that he would not alter their bargain. Did not see the horse and mule taken out of the lot, but believed when he followed, that they were his. Raised no objection to their going out of the lot. After the prisoner had left the negro, witness told him that he, witness, should have nothing to do with it. Witness sent for Mr. Kemp to see whether they should be carried or not. They were to be carried that night. Witness could have prevented the negro taking any the mules if he had taken his gun. Told the negro to carry out the bargain he had made with the prisoner; told

Kemp what the negro had said to him, witness, and asked Kemp to go with him and see whether he did or not. The boy Lewis carried the horse and mule to the prisoner. Lewis was at the time in witness' employment.

James W. Kemp, says: On Friday evening Mr. Helms came to him, and he went over to Mr. Cleaves'—got there about dark. After tea witness and Mr. Cleaves came down to Lemack's, who went with them. Saw the prisoner about harnessing Mr. Cleaves' mules; prisoner had all the harness on, except the breeching, and he was putting that down when witness grabbed him. He started to run as witness caught him. Took prisoner and brought him to jail. Found a buggy and mule and sorrel horse in their possession. The horse was the property of Mr. Cleaves.

Cross-examined.—He and Mr. Cleaves started off; witness with his shot gun. Mr. Cleaves told him of the arrangement.

Upon this evidence the jury found the defendant guilty, but recommended him to mercy, and the Court sentenced him to imprisonment in the Penitentiary for the term of ten years.

Prisoner's counsel moved for a new trial, on the following grounds, which were overruled by the Court:

1. Because the Court erred in its charge to the jury in this: that if they believed, from the evidence, that the defendant procured another to steal the mules, or entered into a conspiracy with another to do the act, then he was equally guilty, as though he had done it himself. The foregoing charge being upon an assumed state of facts, and not warranted by the evidence.

2-3. Because the jury found contrary to the evidence, in this: That there was no evidence of a wrongful or fraudulent taking, or any evidence showing that there was any intention to steal. That there was no evidence that the prosecutor was deprived of the possession of his property.

4. Because the jury found contrary to the charge of the Court, in this: That the Court charged that if there was only

an attempt to steal, and the crime was incomplete, then they could not find the prisoner guilty.

5-6.—Because the jury found contrary to law and evidence, without evidence, and against the charge of the Court. The refusal of a new trial is alleged as error.

STROZIER & SMITH and G. J. WRIGHT, for plaintiff in error.

WARREN, (Solicitor General) for the State.

LUMPKIN, C. J.

[1.] We think the evidence fully warranted the first charge made by the Court. It is not made on an assumed state of facts. But the inference is legitimately drawn from the circumstances, that a bargain was made between the prisoner and the boy Lewis, for the latter to take the property and bring it to him.

[2.] Was not the testimony sufficient to show a wrongful and fraudulent taking, and the intention of prisoner to steal the property? Why not make the trade in open day, and in the presence of Cleaves, if honestly made with Lewis? Did the prisoner believe that the horse and mule belonged to Lewis? Did he not know that they were the property of the employer?

[3.] In reply to the argument that there was no evidence that the prosecutor was deprived of the possession, it is answered that it was removed from his lot and carried to some distance, in the early part of the night, and found in the possession of the prisoner, and that he was making arrangements to do something more, by substituting Cleaves' mule in the place of his own, by harnessing him to his buggy.

[4.] The charge of the Court was right, and the jury found in conformity therewith, instead of contrary to it. It was not merely an attempt to commit a larceny, but that attempt was consummated, as is shown by the proof offered. This is the old case of setting a trap to catch a thief, and succeeding in doing it.

Judgment affirmed.

G. W. LANEY and JOHN W. COX, administrators, and JEREMIAH LASSETS, et. al., heirs at law of Chappell Cox, deceased, plaintiffs in error, vs. WM. B. STEWART and M. A. STEWART, his wife, formerly the widow of Chappell Cox deceased, defendants in error.

The return of commissioners to lay off dower may be contested by the heirs at law. The Act of 1863 gives this privilege to all persons interested.

Assignment of dower. In Webster Superior Court. Decision by Judge CLARKE. September Term, 1866.

William B. Stewart and M. A. Stewart, his wife, applied for dower in the lands of Chappell Cox, deceased, her former husband.

The commissioners made their return, and defendants in error moved to make it the judgment of the Court. The plaintiffs in error traversed the return. The defendants in error moved to strike the names of the heirs at law out of the traverse. The motion was sustained, and the plaintiffs excepted.

J. L. WIMBERLY, and BLANDFORD & MILLER, for plaintiffs in error.

H. K. McCAY and WILLIS A. HAWKINS, for defendants in error.

HARRIS, J.

Upon the return of commissioners appointed to lay off and assign dower to Mrs. Stewart, formerly the widow of Chappell Cox, deceased, a traverse thereof, denying its fairness and that it was in accordance with law, was filed by the administrators of Chappell Cox and his heirs at law. When the case was called for trial, the applicants for dower moved to strike from the pleadings the names of the heirs at law as parties to the proceeding, denying their right to

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be heard in contesting the claim of applicants. The Court below sustained the motion, and this decision constitutes the error assigned.

This case furnishes a striking illustration of a statute on this subject having been forgotten, or having escaped the attention of the counsel and of the Court; we mean the Act of 1863, which allows all persons interested to contest the returns of commissioners.

Let the judgment be reversed.

JAMES C. JOHNSON, plaintiff in error, vs. JOHN J. ALLEN, defendant in error.

The judgment of the Court in continuing or dissolving an injunction, on the coming in of an answer, will not be controlled, except in a case of manifest abuse of discretion.

In Equity. In Bibb Superior Court. Motion to Dissolve Injunction. Decided by Judge COLE. At Chambers. October, 1866.

In September, 1866, Johnson, the plaintiff in error, filed his bill against Allen, alleging that Allen was guardian of the complainant's wife, and, as such, largely indebted to the complainant in right of his wife; that the parties submitted the matter to arbitrators, who, in August, 1866, awarded to the complainant \$3,547.53; that complainant was only awaiting the sitting of the Superior Court to have the award entered and made the judgment of said Court; that the securities to the bond of the defendant as guardian were insolvent; and that defendant, for the purpose of defrauding complainant and to prevent him from realizing the award, was, as complainant was informed and believed, attempting to sell and dispose of his plantation, crops, and stock, the

same being about his entire property, and that he would succeed in this fraudulent design if not restrained by a Court of Equity.

The bill prayed for an injunction restraining the defendant 'from selling or disposing of his property or any part thereof' until the further order of the Court.

The injunction was granted.

The defendant answered the bill, and moved to dissolve the injunction.

The answer admitted the rendering of the award, but alleged that it was fraudulent, specifying in what the fraud consisted, and praying that the award be set aside. It denied that the defendant's real indebtedness to complainant was more than \$1,700.00. It admitted that early in the year, and up to about the first of March, the defendant had offered his property for sale, but with the sole and avowed view of paying all his debts, this one included, if the amount thereof could be agreed upon. It stated that since about the first of March, the intention to sell had been abandoned; and that since the submission to arbitration, the defendant had made no offer of sale, nor had such intention.

The Judge dissolved the injunction, holding that there was no equity in the bill, or if any, that it had been sworn off by the answer.

This is complained of as error.

POE, for plaintiff in error.

WHITTLE, for defendant.

WALKER, J.

The judgment in this case is affirmed, because there is no such abuse of the discretion of the Court below as to require this Court to interfere. The continuing or dissolving an injunction, on the coming in of the answer, is for the

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sound discretion of the Court below, and this Court will not control this exercise of this discretion, except in a case of manifest abuse.

Judgment affirmed.

WILLIAM H. TURNER, JNO. T. HOWARD, and JAMES HENDERSON, plaintiffs in error, vs. SAMUEL D. IRWIN, administrator de bonis non, defendant in error.

- [1.] If the defendant in *fi. fa.* has removed his property, after judgment, from the county of his residence to another, it is ground for proceeding with the *fi. fa.* the same as if he is about to remove it, and the case comes fully within the spirit of the exception of the late Convention.
- [2.] The plaintiff need make no affidavit to entitle him to have a levy made on the ground that the defendant is within the exception to the Ordinance.
- [3.] The defendant may file an affidavit to arrest the *fi. fa.*, if he desires to controvert the fact of his case falling within the exception to the Ordinance. He may bring an action of trespass for an illegal levy, but this is not the only remedy.

Illegality. In Terrell Superior Court. Decided by Judge CLARKE. September, 1866.

On the 20th January, 1866, Samuel D. Irwin made affidavit: That, as administrator de bonis non of Thomas J. Johnston, deceased, he controls two *fi. fas.* against the plaintiffs in error, who reside in Terrell county, where judgments were obtained; that thirty-five bales of cotton marked "S & T," subject to said *fi. fas.*, have been removed from the county of Terrell, and are now stored in the warehouse of Hamlin J. Cook; and affiant has reasons to apprehend their sale or removal, unless the same are levied upon by said *fi. fas.*

Irwin pointed out the cotton, and the Sheriff of Dougherty county levied both *fi. fas.* upon it on the 25th January, 1866.

On the 2nd day of March, 1866, W. H. Turner interposed his affidavit of illegality on the grounds:

1-2. Because he was only security on the written obligation upon which judgments were obtained; that plaintiff (in fi. fa.) levied attachments on property enough of the principal to pay the debt; bond and security was taken for the forthcoming of the property attached, and suit is now pending on the bond. The effect of this is to discharge him as security, at least until the payers of the bond are sued to insolvency. While suit is pending on the bond, the plaintiff (defendant in error) cannot pursue his remedy against the affiant, the law not allowing two actions in the same Court at the same time between the same parties, founded on the same subject matter.

3. The lien having been fixed upon the property of the principal by the action of the plaintiff (defendant in error), cannot be discharged to the prejudice of the security.

4. The interference of the security on the bond aforesaid having operated to the prejudice of affiant without his agency, makes them first liable.

5. A levy on the property of the principal sufficient to satisfy the debt is a discharge as to the security, and property in this for that purpose is still in the custody of the law, and must be subjected to the payment of the same.

6. Affiant was not within the exception of the Ordinance of the Convention so as to warrant a levy and sale of the property. He had merely carried it to Albany for storage in a warehouse; was not proposing to sell it at the time of the levy, nor had he before.

Amended affidavit of Turner.

1. Under the facts stated in plaintiff's (defendant in error) affidavit, the levy upon said cotton was illegal.

2. It does not appear in the affidavit that affiant removed the cotton from Terrell county.

3. At the time of the levy, affiant had property in the county, unincumbered, subject to the fi. fas., and more than enough to pay them off.

4. The cotton was not removed to Albany for the purpose of avoiding the *fi. fas.*, or in any wise to defraud plaintiff. It was not his intention to remove the cotton from Albany; it was placed there for storage.

At the hearing, counsel for plaintiff in error moved to dismiss the levies upon the ground that the affidavit of the plaintiff (in *fi. fa.*) was not in compliance with the provisions of the Ordinance of the State Convention re-enacting the so-called stay law. This motion was overruled by the Court on the ground that the affidavit was in substantial compliance with the stay law. The Court also overruled the affidavit of illegality, and ordered the *fi. fas.* to proceed; and this ruling is alleged as error.

VASON & DAVIS and HOOD, for plaintiffs in error.

LYON & IRVIN, for defendant in error.

LUMPKIN, C. J.

[1.] On the first of November, 1865, the Convention passed an Ordinance to prevent the levy and sale of property of debtors, except in certain specified cases, among which was this: "Where the defendants are about to remove their property beyond the limits of any county in this State." Irvin's executions were levied 30th January, 1866, issuing on judgments dated 7th December, 1865—the plaintiff making affidavit that the property had been removed, since the rendition of the judgments, from Terrell county, where it was produced, to Cook's warehouse, in the city of Albany, and, as he had reason to apprehend, it would be removed from thence and sold.

This affidavit of the plaintiff, it will be perceived, is not required to be taken by him before he is entitled to levy. He acts upon his own judgment and responsibility. If the property is not subject, the defendant can bring trespass, or the debtor can file his affidavit of illegality, and have the

issue tried—I mean, of course, under the stay hindrance of the Convention. The plaintiff, however, made his affidavit as preliminary to the levy, and the defendant, after the passage of the stay law, amended his affidavit, inserting additional facts; still, he admits the removal of the cotton from Terrell county, where there were depots and places of deposit for cotton, to Albany.

Upon the facts thus presented by the affidavit of the plaintiff and counter-affidavit of the defendant, the Court decided that the words of the stay Ordinance, to-wit, that the debtor “was about to remove his property without the limits of the county,” were substantially complied with; and that is the only question excepted to, and which we are called upon to review, the other questions being expressly waived in the argument.

We consider that the removal of the cotton, after the rendition of the judgments, under the facts and circumstances of this case, was such a removal, under the Ordinance, as entitled the plaintiff to make the levy; and the defendant, conceding the facts, instead of going before a jury, upon an affidavit of illegality, left the law of the case to be decided by the Court.

As the stay law was passed before the cotton was sold, the amended affidavit of the defendant was evidently intended to avail himself of its provisions, not, indeed, to insist on the constitutional competency of the Legislature to pass that law; (that question is clearly not in the record, nor was it passed upon by the Court below,) but to take himself out of the exception provided by that Act. There is one fact as to putting himself under the stay law: the defendant did not give or offer to give the bond required by that Act, in order to suspend the sale. He is not, therefore, entitled to its benefit.

As to the constitutionality of the stay law, it is natural that the profession and the people should be anxious to know how the question will be decided by this Court. We again repeat, sufficient unto the day is the evil thereof. For my-

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self, I should look upon it as a misfortune to decide it either way; still, when it comes, if come it must, we hope to meet it as best we may, unflinchingly, I hope, in the discharge of duty, considering, however, that the delay in the meantime subserves the best interest of the country, both as regards the creditor and debtor classes. How many claims have been compromised since this subject was first agitated? and this process is constantly going on. One propitious season would so far relieve our impoverished people as to allay much of the excitement that has hitherto agitated the country. More than four-fifths of a century have elapsed since the Constitution of the United States was adopted. In that time, there have been State decisions both for and against a *stay law*; and yet, strange to say, no appeal has been taken to the Supreme Court of the United States. That question has never, as yet, been directly met and adjudicated by that tribunal. It would ill-become us to step out of the way to decide it under such circumstances. At best, it would be but the individual opinion of the members of the Court, and not the judgment of the Court itself.

Judgment affirmed.

JAMES J. FORD and BELL & GASKILL, plaintiffs in error, vs.
ANDREW T. FINNEY, defendant in error.

One taking a bond for titles by assignment, under a contract to pay the purchase money due to the original vendor, may be compelled by a Court of Equity to perform his contract. It is not a parol promise to answer for the debt of another; nor is it a parol contract for the sale of land.

In Equity. In Fulton Superior Court. Demurrer. Decided by Judge WARNER. October Term, 1866.

Ford, et. al. vs. Finney.

On the 14th of September, 1865, Ford, Bray & Co., a copartnership of which James J. Ford, one of the plaintiffs in error, was a member, purchased of Bell & Gaskill, the other plaintiffs in error, a lot in the city of Atlanta, giving their three promissory notes therefor, due respectively the first of January, the first of April, and the fourteenth of August, 1866, and taking a bond for titles to be made by Bell & Gaskill when all the said notes should be paid off. Under this purchase, Ford, Bray & Co., went into possession of the premises, and then sold out to Ford & Finney, another copartnership, composed of the said James J. Ford and the defendant in error, Andrew T. Finney. Ford, Bray & Co. transferred to Ford & Finney the said bond for titles, and the latter firm undertook and agreed with the former to pay off the said notes to Bell & Gaskill. Under this arrangement, Ford & Finney entered into possession of the lot, and commenced building thereon. When the building was nearly completed, to-wit, on the 2d of January, 1866, Ford sold out his interest to Finney, transferring to him the bond for titles, and leaving him in the sole possession and ownership of the premises. Finney gave Ford, for his interest, about four hundred dollars, besides agreeing with him to pay off the said notes to Bell & Gaskill. After this, Finney obtained a policy of insurance on the building. The building was destroyed by fire, and the money due on the policy was collected by Finney.

Finney failed to pay anything upon the notes to Bell & Gaskill, and after they all matured, and two of them were placed in suit against Ford, Bray & Co., the makers, and threats had been made by Bell & Gaskill to sue on the third also, Ford filed his bill against Finney, (amending it subsequently so as to make Bell & Gaskill complainants with him,) in which he alleged the foregoing facts, and moreover, that Bell & Gaskill were able, ready and willing to execute to Finney good and sufficient titles in fee simple to said premises, upon the payment of said notes; that Ford had repeatedly requested and urged him to pay the same; but that he utterly failed and refused so to do.

Ford, et. al. vs. Finney.

The bill prayed that Finney might be decreed to specifically perform his contract with Ford by paying off and discharging said notes, and for discovery and general relief.

Finney, the defendant in the bill, demurred to it for want of equity, and because the contract set forth, not being in writing, was not such as a Court of Equity will enforce, and because the complainant Ford, did not show himself to be in a condition to perform the same on his part.

The Court sustained the demurrer and dismissed the bill. To this the complainants excepted.

COLLIER & HOYT, for plaintiffs in error.

HAMMOND & MYNATT, for defendant.

WALKER, J.

The very learned Judge who presided in this cause dismissed the bill on the grounds, as we understand, that the contract between Ford and Finney was such as could not be enforced, being obnoxious to the statute of frauds. *Code, sec. 1952, clause 2.* We think he erred. In the first place, we do not think Finney made any "promise to answer for the debt default or miscarriage of another." The contract, as we construe it, is this: Ford sells his interest in the city lot to Finney, and, in consideration of the written assignment of the title bond to Finney, he paid Ford four hundred dollars, and promised to pay to Bell & Gaskill thirty-eight hundred dollars more; that is, Finney purchases the lot, takes a bond for titles, and promises to pay thirty-eight hundred dollars in addition to the four hundred already paid to Ford. It is a simple contract of purchase and sale, and the only feature which distinguishes this from an ordinary contract is, that Finney promises to pay the thirty-eight hundred dollars to Bell & Gaskill instead of to Ford, or Ford, Bray & Co. This is the debt of *Finney*, and this he promises to pay. He is liable to pay, although his promise is not

in writing. He has received the consideration, and Ford proposes to make title and compel payment. Is there anything unreasonable in this? This is no effort by the vendor to enforce specific performance of a *parol* contract for the sale of lands. A title bond was made to Ford, Bray & Co., and assigned to and accepted by Finney, who went into possession of the land. In order to prevent circuity of action, and to bring all the parties at interest before the Court, so that full and complete justice may be done, this bill should be maintained. Why compel Bell & Gaskill to collect the money out of Ford, Bray & Co., and then Ford, Bray & Co. have to sue Ford & Finney, and then Ford sue Finney, when the rights of all the parties can be readily adjusted under this bill?

It was insisted that the complainants have a complete and adequate remedy at law. Perhaps, under the *Code, Section* 3014-15, the parties might have accomplished at law what they propose by their bill; but, according to *Section* 3028, a mere privilege to a complainant to sue at law, or the existence of a common law remedy, shall not deprive Equity of jurisdiction. The remedy at law must be as complete and effectual as the equitable relief, in order to oust a Court of Equity of jurisdiction. We think, in this case, the remedy at law was not as complete as in equity. Taking the allegations in the bill to be true, we think Equity can do more complete justice between all the parties than law, and that the bill should have been sustained, and the rights of all the parties settled under it.

Judgment reversed.

DIXON CARROLL, plaintiff in error, vs. JOHN MARTIN, and others, defendants in error.

Injunction properly dissolved.

Carroll vs. Martin, et. al.

Motion to Dissolve Injunction. Decided by Judge HANSELL. At Chambers. August, 1866.

The bill alleged a partnership between the complainant and the defendants in two kilns of brick, and an injunction was granted to secure the complainant's alleged interest in the proceeds of both. The answer denied the partnership as to the second kiln, setting up that the partnership had previously been dissolved in consequence of a failure by the complainant to pay in capital according to his original undertaking.

The presiding Judge dissolved the injunction, except as to matters touching the first kiln, and this judgment is brought up by the complainant as erroneous.

SEWARD & WRIGHT, for plaintiff in error.

ALEXANDER, for defendants.

HARRIS, J.

To have retained the injunction against the defendant as to the second kiln of bricks would, to some extent, have carried along with an order, after the motion made to dissolve, an implication that complainant had an unquestionable interest as a co-partner in said second kiln. That is a main point in controversy between the parties. The Judge acted discreetly in refusing to retain the injunction as to that kiln, from the facts as exhibited in the record. The question whether plaintiff had not distinctly withdrawn from the co-partnership in the brick-making business, before defendants entered upon the making of such second kiln, is an appropriate one for a jury to decide, upon hearing all the testimony; and when this shall have been determined, the task of adjusting the relative rights and interests of the parties by a proper decree, will be one of easy accomplishment.

Judgment affirmed.

PATRIK CARTER (a person of color,) plaintiff in error, vs.
THE STATE OF GEORGIA, defendant in error.

A negro man being found in the bed of a girl at an unseasonable hour of the night, and when she awakes he has his hand on her arm, holding her by the wrist, and escapes when she calls out to the family for help, may be convicted by the jury of an *intent* to commit a rape.

Assault with Intent to Commit a Rape. In Cobb Superior Court. Tried before Judge MILNER. September Term, 1866.

The evidence for the State was as follows :

Hepeey Holmes—On the 17th of August, 1866, in the city of Marietta, Cobb county, witness found, in the night, on waking up, that some one was lying beside her, with his hand on her arm. She woke up her sister and told her of it. She then woke up her father to tell him, but the person escaped out of the window. She recognized the prisoner at the bar as the person. Her father caught hold of the prisoner, but could not hold him. This was about a half hour before day.

Cross-examined—Prisoner, or the person, did not do anything but take hold of her arm at the wrist. There was no light in the house. Witness could tell him by his features and by his voice. She had heard him speak to her father that evening. She did not see him distinctly enough to recognize him as the prisoner. She only thought it him from his voice, but is not certain.

William Holmes—Knew nothing of the assault until waked by his daughter, who called him and told him there was a negro in bed with her. He rushed to the window, and as the person was escaping, caught him by the arm, but could not hold him. He recognized the prisoner as the person. He thinks it was a little before day. The first he saw of the prisoner at the time was when he was escaping from the window, having his feet out of it.

Cross-examined—No black person was ever seen by wit-

ness to pass the cross street, except prisoner. He saw an abundance of black persons passing about the grocery near his house, and on the main street.

The evidence for the prisoner was as follows :

Mrs. Mary McCown—Prisoner lives with witness—sleeps in the basement, under her bed room. The door of the basement goes out just under the window at the head of her bed. Prisoner was in his room about ten o'clock on the night of the 17th of August. She knows, also, that he was at home on the night of the 16th of August; that he came to his room about ten o'clock at night on the 17th. She ordered him to bring a bucket of fresh water, which he did, and then went to his room. She was sick and up nearly all night, and heard prisoner talking with his wife. He was evidently under the influence of liquor. If he had come out of his door, witness would have known it. She believes he did not leave home that night, for his door makes a noise when opened, which she would have heard, and there was no other way for him to come out.

After a verdict of guilty, the prisoner's counsel moved for a new trial, because the verdict was contrary to law, contrary to evidence, and decidedly against the weight of the evidence.

A new trial was refused, and this is complained of as error.

Knight, for plaintiff in error.

Phillips, Solicitor General, for the State.

Lumpkin, C. J.

That the prisoner is guilty of an assault, is clear; for he was in the bed, holding the arm of the girl by her wrist, without her consent or permission, and, as she called for help so soon as she awoke and found him in that position, we may say forcibly and against her will. And the only

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question is, the intent with which it was done; and this invites a further inquiry, viz., how far the accused must go before this intent is established? Here it is certain, from the position of the parties, that the negro intended sexual connexion, forcibly or by consent. This was his intent. There is not a particle of proof to show that he expected it to take place by the consent of the girl. Was it not legally inferable that the intent was to gratify his lust forcibly? There is no evidence of any amorous manipulation with her person, but when she awoke, he had her by the wrist. Were the jury warranted in inferring, from the evidence, that the intent was to commit a rape? I ask, how far should one go to consummate this crime? If a man is found in the bed of a woman at an unseasonable hour of the night, and wakes her up by demonstrations such as were proven in this case, may he not be convicted of this *intent* as well as any other? and is it not more likely to be true than any other? As to the proof of the *alibi*, we do not think it amounts to much.

Judgment affirmed.

SHADE CARTER, plaintiff in error, vs. THOMAS COMMANDER, defendant in error.

A judgment of the County Judge, upon possessory warrant, though not rendered in Term time, may be carried before the Judge of the Superior Court in the manner prescribed by the 81st Section of the Act organizing the County Court.

Certiorari. Decision by Judge HANSELL. At Chambers. September, 1866.

The County Judge of Thomas county tried a possessory warrant, sued out by Commander against Carter to recover

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possession of a horse. The trial was had in vacation, and not at any regular or special Term of the County Court. The Judge awarded the possession to Commander, the plaintiff in the warrant.

Thereupon, the defendant, Carter, proceeded according to the 31st Section of the Act organizing the County Court, to bring the proceedings before the Judge of the Superior Court for review. When the case came up before him, Judge Hansell dismissed the *certiorari*, on the ground that the method pointed out in said Section of the Act, was not applicable to a possessory warrant tried by the County Judge out of Term.

This is complained of as error.

SEWARD & WRIGHT, for plaintiff in error.

SPENCER & HANSELL, for defendant.

WALKER, J.

We think the Court erred in dismissing the *certiorari*. The petitioner had complied with all the requisites of the statute providing for carrying up cases from the County to the Superior Court. Having done so, he was entitled to a hearing before the Judge of the Superior Court. We understand the provisions of the 31st Section of the Act organizing a County Court, *Pamph. Acts 1865-6 p. 69*, to apply to *all* cases of "parties complaining of error" committed by the County Judge, whether presiding in Term or otherwise. We, therefore, reverse the judgment of the Court below, and direct the hearing of the *certiorari* upon its merits.

WILLIAM MORROW, plaintiff in error, vs. THE MERCHANTS' AND PLANTERS' BANK, defendant in error.

[1] Amendment to declaration, adding the name of a usee, disallowed, because the effect of it would have been to deprive defendant of the benefit of setting off bank notes issued by the plaintiff, an incorporated Bank.

[2] Had the amendment been proper, the plea of set-off ought to have been stricken; but as the allowance of the amendment was error, so, also, was the striking of the plea.

Complaint. In Terrell Superior Court. Tried before Judge CLARKE. November Term, 1866.

Upon a draft for six thousand dollars, drawn by Robert Morrow upon William Morrow, the plaintiff in error, payable to John V. Price, dated April 2d, 1860, due at six months, and endorsed, in blank, by Price, the payee, the Merchants' and Planters' Bank brought an action against the said William Morrow, returnable to the May Term, 1861, of Terrell Superior Court.

Morrow, the defendant below, filed several pleas, to-wit: (1) The general issue; (2) That the draft was never negotiated to, or owned by the Bank, but was the property of Philip J. Giles & Co., who advanced upon it to the drawer three thousand dollars, and took the draft to hold as collateral security therefor; (3) That the consideration of said draft was not six thousand dollars, but three thousand dollars, which latter sum the defendant admitted, by his plea, to be due and offered to pay.

At November Term, 1866, the case came on for trial, when the Court, against the objection of defendants counsel, permitted the plaintiff to amend the declaration by adding after the name of the Bank, the words "who sues for the use of William R. Phillips," counsel for plaintiff stating that Phillips was the real party at interest.

The defendant having filed an additional plea, to-wit: That he has deposited in the Clerk's office of the Court the amount which he owes or can owe on said draft, in the bills of said Bank, and that said money, to-wit, four thousand four hundred dollars, there on deposit, he tenders in payment, and

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offers to set off against the demand of said plaintiff," counsel for plaintiff moved to strike out said plea. The Court granted the motion, and ordered the plea stricken.

The errors assigned are, first, the allowance of the amendment to the declaration; secondly, the striking of defendant's plea.

MORGAN, for plaintiff in error.

SCARBOROUGH, for defendant.

HARRIS, J.

[1] The defendant in error brought suit against Morrow for the recovery of a balance of \$3,000, due on a draft in its possession. When the case was called for trial, the attorney for the Merchants' and Planters' Bank moved to amend his declaration by adding after the name of the Bank the words "who sues for the use of William R. Phillips."

Previous to this motion Morrow had procured, by purchase or otherwise, an amount of the notes of said Bank equal to the aggregate of the principal and interest of the balance due on the draft, and had placed his plea of the tender of said notes as a set-off against the demand of the Bank on file with the Clerk. The motion to amend was objected to by Morrow's counsel; the Court allowed the amendment to be made. The first error assigned in the bill of exceptions is the allowance of said amendment, and we think the objection well made, under the facts presented by the record. However liberal are our statutes permitting amendments, and disposed, as we are, to sanction all that are necessary for the ends of justice and to prevent delays and non-suits, we are clearly of the opinion that an amendment which virtually substituted a new plaintiff and deprived the defendant of a right of set-off of the notes of the bank, should not have been allowed.

[2] The next error assigned is that of the Judge, after the amendment before mentioned, on motion of the plaintiff be-

low, directing the plea of defendant of set-off to be stricken out.

Had the amendment allowed been proper, there would have been no error in striking the plea; but as the amendment was erroneous, the striking of the plea is necessarily so.

The pleadings should be restored to their status at the time these motions were made and sustained.

The judgment below is therefore reversed.

WILLIAM WHITE, Senior, plaintiff in error, vs. JOHN R. HART and W. D. DAVIS, defendants in error.

[1.] A second original and process to perfect service on a joint defendant residing in another county, may issue, by way of amendment, after the appearance Term of the case.

[2.] Principal and surety may be sued together, in the county of the surety's residence.

Motion. In Chattooga Superior Court. ' Decided by Judge MILNER. September Term, 1866.

Upon a promissory note signed by Hart and Davis, (the latter as security) reading on its face " I promise to pay," etc., White filed his declaration, returnable to March Term, 1866, of Chattooga Superior Court. The declaration alleged that both defendants were of Chattooga County. The Sheriff served Davis, and returned, as to Hart, *non est inventus*. Hart's residence was, until after the appearance Term of the case, unknown to the plaintiff or his attorneys. Soon after that Term, Davis gave notice to the plaintiff to sue Hart. The plaintiff, learning that Hart was then a resident of Morgan county, caused the Clerk in Chattooga

issue a second original and copy, and had the same served on Hart by the Sheriff of Morgan county on the 24th of April, 1866.

At September Term, 1866, the cause came on to be heard, and the foregoing facts appearing to the Court, plaintiff's counsel moved to amend the declaration and process so as to state that Hart resided in Morgan county, and so as to make the process returnable to March Term, 1867, instead of March Term, 1866; and that a copy of the order for such amendment be served upon the defendants thirty days before the next Term.

The Court refused this motion; and then counsel for Davis moved to dismiss the action, because Hart had not been legally served, and because, under the Constitution of this State, the defendants could not be jointly sued in the county of the residence of the security, but only in the county of the residence of the principal.

The Court dismissed the action as to Hart, but not as to Davis.

The errors assigned are the refusal of the plaintiff's motion, and the granting of the defendant's so far as to dismiss against Hart.

KIRBY, and WRIGHT & BROYLES, for plaintiff in error.

HARVEY & SCOTT, for defendant.

LUMPKIN, C. J.

We are inclined to think the Court erred throughout this proceeding. Formerly, under the Judiciary Act of 1799, process, if not sued and served in strict conformity to the requirements of the statute, was declared to be null and void. This was the strong language of the statute. But all this is changed; and relaxation, and not stringency, is the rule now. The Courts began to modify with the Act of 1853, and progressed with the broad allowance of amend-

ments made by the Code, and the decisions and legislation which preceded it; so that now, if there be a legal cause of action set out in the declaration, and the defendant has had notice of the pendency of the suit, all other objections are to be disregarded, by so amending the proceedings as shall subserve the ends of justice. See, especially, Sections 200 and 3258, *et passim*, of the Code.

Why not allow the plaintiff to amend his writ as he desired, and take time to perfect service? I know no time, limited by law, when the amendment of the writ should be made. I must confess, I have more doubt as to not allowing the amendment which White voluntarily caused the Clerk to make, than to disallow the one which he moved the Court to grant at its late Term.

In holding that Hart, the maker, could not be sued in Chattooga county, we ask, why not? He and Davis are joint and several promissors, and the note is to be treated as the joint and several note of them all. "I promise to pay" is the form of the promissory note. See *Constitution, Art. 4, sec. 2, par. 10-11*. By these it will be seen that joint promissors may be sued in either county, where either of them resides, and it is only in the case of a maker and indorser that the Constitution requires that the suit must be brought in the county where the maker resides.

Judgment reversed.

MASON J. HUGULEY, plaintiff in error, vs. ELIZA HOLSTEIN,
defendant in error.

[1.] This Court is less disposed to control the decision of the Court below where a new trial has been granted, than where it has been refused.

[2.] On a rule to foreclose a mortgage, the mortgagee, when introduced as a witness by the mortgagor, must answer as to his *belief*—especially when his memory is not good, and he can not be positive as to the facts of the case.

Huguley vs. Holstela.

Motion for New Trial. In Monroe Superior Court. Decided by Judge SPEER. At Chambers, September, 1866.

The cause tried below was an issue upon a rule to foreclose a mortgage on land, between the plaintiff in error, as mortgagee, and the defendant in error, as mortgagor.

The mortgagor introduced the mortgagee as a witness, who testified that he could not be positive as to the facts of the case, as his memory was not good; that, to the best of his recollection, the amount of Confederate Treasury notes loaned by him to the mortgagor, when the note and mortgage were given, was \$5,000, and that the balance of the debt was for liabilities incurred before the war—some of them for money loaned; that he did not state this as the exact amount, but to the best of his memory; that it might have been \$6,000—he did not think it was \$7,000, and was certain that it was not \$10,000. Counsel for mortgagor asked him if he did not *believe* it was \$6,000; and on exception to this question, the Court ruled it illegal. This ruling was made one of the grounds of a motion by the mortgagor for a new trial, after a verdict was rendered against him.

The Court granted a new trial, and this is now complained of by the mortgagee.

CABINESS & PEEPLES, for plaintiff in error.

TRIPPE, for defendant.

WALKER, J.

[1.] Did the Court err in granting a new trial? This Court is less disposed to control the discretion of the Court below where a new trial has been granted, than where it has been refused. In the latter case, the decision is final; in the former, the parties have an opportunity to be heard in the assertion of their rights.

[2.] It is a rule of equity pleadings that a defendant, when

vs. The Macon and Western Railroad.

facts he may know in favor of
ording to the best and utmost
information and *belief*." 2
Witts vs. Hooper, 16 Ga. R.,
a party believes a fact against
a jury may believe it, too. We
applies in a case where a party is
ess by his adversary—especially in a
tory is so indistinct as in this case.

Common law proceeding to foreclose a mort-
stitute for a proceeding in Equity. Why
the rules of proceeding in Equity apply? We
Court, in granting a new trial, committed no such
as to make it our duty to reverse his decision, and we
before affirm the judgment.

WITHERS & LOUD, plaintiffs in error, vs. THE MACON &
WESTERN RAILROAD COMPANY, defendant in error.

A Railroad Company having no interest in a contract for *through* transportation, made
between other parties, cannot prevent the consignee from stopping the goods before
reaching their line of Road. And if they carry the goods over their line, in spite of
the consignee's objections, they have no right to collect any freight or expenses.
While goods are in progress over a *through line*, they cannot, without the carrier's
consent, or the payment of freight for the whole distance, be stopped by the consignee
short of the destination fixed by contract; but the benefits of the contract will be
confined to such carriers as were interested in it when made.

In Bibb Superior Court. Decision by Judge COLE. No
vember Term, 1866.

A lot of corn belonging to the plaintiffs was transported
from Atlanta to Macon by the defendant, and not being ap-
plied for at the depot, was, after the lapse of several days,
stored by the defendant in a warehouse in the city. On ap-

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plying for the corn, thereafter, the plaintiffs were required to pay the freight on the same from Atlanta to Macon, together with drayage, storage, etc., after its arrival. They made the payment, with the understanding that the defendant would refund the money if not legally entitled to collect and retain it.

A case was made, and when the same came on to be heard, it was, by consent of parties, submitted to the presiding Judge for his determination on both law and fact, subject to review by the Supreme Court.

The facts, so far as it is necessary for them to be known in order to understand the point decided by the Supreme Court, were as follows:

The corn was shipped from St. Louis on bills of lading, reading thus:

“ST. LOUIS, March 29th, 1866.

Shipped, in good order and condition, by Robinson & Garrard, for account and risk of whom it may concern, on board the good steamboat called the Silver Ware, whereof ——— is master, for the present voyage, now lying at the Port of Saint Louis, and bound for Tennessee River, the following packages or articles, marked or numbered as below, which are to be delivered without delay in the like good order at the Port of Macon, Ga., (unavoidable dangers of the River and Fire only excepted) unto Withers & Loud, or assigns, they paying freight for said goods at the rate of 47 cents per bushel to Atlanta, thence subject to local freight.

In witness whereof, the owner, master or clerk of said steamboat, hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

(Signed)

TRUSETAIL.”

About the 9th of April, several days before the arrival of the corn in Atlanta, Dean, Browning & Co. exhibited to the authorities of the Western & Atlantic Railroad, at that point, an order from Withers & Loud directing the delivery of the corn to Dean, Browning & Co., at Atlanta. The

officers of the Western & Atlantic Railroad replied that they had no right to deliver upon that order, as they had contracted to deliver to the agent of the Macon & Western Railroad, but that if said agent would give an order for the delivery of the corn, they would comply with it. Thereupon, Dean, Browning & Co. exhibited to the authorities of the Macon & Western Railroad the said order from Withers & Loud, telling them that if the corn were transported to Macon, there would be no one there to receive it or pay freight, but if stopped in Atlanta, Dean, Browning & Co. would pay the freight to this latter point. The agents of the Macon & Western Road refused to consent to a delivery in Atlanta, and on a second demand, repeated the refusal.

Subsequently, upon freight lists headed "Western & Atlantic and Macon & Western Railroads: Transportation from Chattanooga to Macon," and dated April 16th, 1866, the corn went through to Macon, and was there dealt with as has already been stated. These freight lists set out the charges for transportation in three columns, one headed "Expenses," another "W. & A. R. R." and the third "M. & W. R. R."

Among the evidence adduced by the defendant in the Court below were the statements (received by consent) of the President and the Superintendent of the defendant's Road.

A part of the President's statement was as follows:

"The shipment of 800 sacks of corn by Withers & Loud, from St. Louis, on a through freight contract to Macon, bound the Macon & Western Railroad to continue the transportation to Macon, when the Western & Atlantic Railroad should deliver the same at Atlanta; and upon a failure to so continue and deliver to Messrs. Withers & Loud, at Macon, their corn, would have made the Road responsible for damages. It is not usual for Railroads to deliver freight in transitu, and when so required, they have a right to object unless compensated and secured in the same manner as if they had made the transportation."

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A part of the Superintendent's statement was as follows :

"The stoppage of freight, while in transitu over a through line of different Roads, is very seldom permitted by Railroads, and then only on ample security being given the Roads against any trouble or loss that may arise in consequence of such stoppage."

Among the evidence adduced by the plaintiffs was the deposition of one A. P. Bell, as follows :

"On or about the 19th day of April, 1866, I accompanied Messrs. Withers & Loud, of Macon, Georgia, to the Planter's Hotel, in the city of Atlanta, to see A. J. White, President of the M. & W. R. R., for the purpose of getting him to issue an order to stop the transportation of a certain lot of corn, consigned to Withers & Loud, Macon, Georgia, the authorities of the W. & A. R. R. refusing to stop said corn in transitu without such order. I saw them meet—was present. Mr. White at first refused, but when they demanded as their right to control their own property, he acknowledged the right, and ordered his agent at this place to give the order, which he did, placing the same in my hands."

The presiding Judge decided that the plaintiffs were liable for and bound to pay the freight from Atlanta to Macon, as also all the contingent expenses arising from their neglect to receive and remove the corn on its arrival there at the defendant's depot. This decision is complained of as erroneous.

COBB & JACKSON, for plaintiffs in error.

WHITTLE & GUSTIN, for defendant.

HARRIS, J.

This case turns altogether on the fact, whether the defendant in error was interested in the contract made in St. Louis by the plaintiffs with the Steamboat Company, for the shipment of corn to Macon.

We have given a careful examination to the testimony in

the record, and are unable to discover any contract made at St. Louis in behalf of the defendant in error, or that it was, by any arrangement known to the public or the freighters in this case, to have been jointly interested in the business of through transportation, with the Steamboat Company of St. Louis and the Western & Atlantic Railroad.

Without such contract in its behalf, or such joint interest in what is called through transportation, there can be no just claim to tax plaintiffs with freights and other expenses on its Road. In such a case as this, the plaintiffs in error had a right to arrest the transportation of their corn at Atlanta, as they sought to do, without being subjected to the payment of freight on it to Macon. Had, however, the Macon & Western Railroad an interest in a through contract from St. Louis to Macon, the plaintiffs could not have had any legal right to have stopped their corn at Atlanta without the payment of freights from Atlanta to Macon, though the Road may not have "incurred any expense, risk or liability, whatever," and though the consignors or consignees may have demanded the corn at Atlanta, "before any risk, expense or liability had incurred."

We give no sanction to the position, taken and argued with ingenuity, that the freighter of cars has a right to stop the transportation of goods at such points as his interest or caprice may dictate. Such a right can only be acquired by special contract with the Railroad Company.

This decision is made in behalf of the plaintiff in error, *solely* on the ground that neither the bills of lading made at St. Louis, or the freight bills of the Western and Atlantic Railroad at Chattanooga, or other testimony in the case, shows the Macon and Western Railroad to have been interested in a through freight arrangement from St. Louis to Macon, Ga., and that plaintiffs in error knew it, and acted on that knowledge when they sent forward their corn.

Let the judgment, therefore, be reversed.

JESSE M. CARROLL, plaintiff in error, vs. BENJAMIN F. MCCOY,
defendant in error.

If several garnishments be served upon the maker of a note and the holder of it, returnable to different Courts, and the holder of the note deliver it up to the Court in which the oldest garnishments are pending, and the note is sold by order of that Court, and the proceeds are distributed to the creditors moving in that Court (the creditors in the other Court having notice,) and the maker of the note afterwards pay it off to the purchaser, he cannot be required to pay it again on the younger garnishments pending in the other Court.

Garnishment. In Newton Superior Court. Decided by Judge SPEER. September Term, 1866.

Carroll was administrator of James Hodge, deceased. One Skelton was entitled to some of the estate. He made a power of attorney to one Bailey to settle for him with the administrator. Bailey did settle, taking the note of Carroll, payable to himself, and gave a receipt in full.

On the same day, (April 12th, 1861,) four attachments were issued against Skelton, one of them in favor of McCoy, returnable to the June Term, 1861, of the Inferior Court; another in favor of William D. Luckie, returnable to the April Term, 1861, of a Justices' Court; another in favor of James H. Rakestraw, returnable to the same Term; and another in favor of Richard King, returnable to the same Term of the same Justices' Court. McCoy's attachment, returnable to the Inferior Court, was levied by serving a summons of garnishment on Bailey, April 16th, 1861; and by serving a summons of garnishment on Carroll, April 24th, 1861. Luckie's attachment, returnable to the Justices' Court, was levied upon one box, and by serving summons of garnishment on Bailey and Carroll, April 12th, 1861.

When the attachments of Rakestraw and King were levied does not appear, but they were returned to the April Term, 1861, of the Justices Court, as levied by serving summons of garnishment upon Bailey. To these two last mentioned attachments, Bailey, the garnishee, answered that he had in his possession the aforesaid note, and delivered up the same to the Justices' Court. The Justices' Court, on the 30th of July,

1861, ordered it sold; and it was accordingly sold by the Constable on the fourth Saturday in October, 1861. Before this sale, to-wit, on the 28th of September, 1861, the attorneys of McCoy and Luckie gave notice to the Constable not to deliver the note or its proceeds, if sold, as these clients of theirs had superior liens upon it. The Constable, however, sold the note and delivered it to the purchaser; and several months afterwards Carroll paid it off to the purchaser.

Before this, to-wit, on the 24th of June, 1861, Carroll appeared at the Inferior Court and answered to the summons of garnishment served on him by McCoy, admitting the facts as to the note given to Bailey, and setting up that he had been garnished by Luckie, but admitting that McCoy's garnishment was first served.

The Inferior Court, upon this answer, gave judgment against Carroll; and he appealed to the Superior Court, which latter Court, at September Term, 1866, on an agreed state of facts, corresponding substantially with the foregoing, rendered a similar judgment; to which the counsel for Carroll excepted.

FLOYD, for plaintiff in error.

CLARK, for defendant.

LUMPKIN, C. J.

There is one thing rather singular, Carroll in his deposition states, that McCoy's garnishment was served upon him first. Upon this subject he was manifestly in error, as the return of service on the different garnishments by the proper officer, abundantly proves. How he came to fall into the mistake, I do not understand; or whether the Court below put his decision upon this admission, is not stated. But we repeat, the fact is otherwise, and he ought to be relieved against the liability, if he suffered from the mistake in his

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deposition. But even if we are wrong as to dates, still we think the judgment was erroneous.

The Justices Court had jurisdiction of the subject, and all the parties were notified of the pendency of the proceedings there; under the order of this Court, the note was turned over to the Constable, and ordered to be sold, and subsequently paid off to the purchaser by Carroll. Under these circumstances it was manifestly wrong for the Judge to hold him liable to pay the money a second time, and that, too, to a creditor whose garnishment was not served until after those which were returnable to the Justices Court, upon which the note was sold.

DRURY B. CADE, plaintiff in error, vs. ABRAHAM BURTON and
URIAH O. TATE, defendants in error.

If one makes a sale of land by deed without warranty, but representing it to be his own, and afterwards convey the same land to a *bona fide* purchaser without notice, the period of limitations applicable to an action against him for the fraud is the same as that which would apply to an action for the land, to-wit: seven years from the discovery of the fraud

Equity. Elbert County Superior Court. Decided by
Judge WM. M. REESE. September Term, 1866.

The controversy in this case was about a strip of land claimed by the proprietors of two contiguous tracts, known as the Burton and the Ragland tracts.

For many years prior to 1847, the former was owned by the defendant Burton, and the latter by John D. Watkins. In that year, Burton conveyed the former tract to Cade, the plaintiff, by deed, with the usual warranty. At the end of the deed this clause occurs:

"There is a disputed line of boundary between John D. Watkins and myself, on the west of my tract, running out

"from Broad river, which I, the said Burton, exempt and exclude from the warranty, and leave this line to be adjusted by the said Cade with the said Watkins, without recourse on me."

This deed was not recorded till March, 1857.

The line was never settled between Cade and Watkins, neither of them enclosing or otherwise taking exclusive possession of the disputed land.

On the 2d day of January, 1855, Watkins conveyed the Ragland tract to defendant Burton, and in the deed described it as "divided from lands sold by said Abraham Burton to Dury B. Cade by a line agreed upon and marked by the said John D. Watkins and Abraham Burton before the sale aforesaid to Drury B. Cade, and never reduced to writing, running as follows:" — and then follow boundaries which give the disputed land to the Ragland tract.

On the 6th of February, 1855, Burton conveyed the Ragland tract to Tate, the other defendant, with the same description as in the last deed. These last two deeds were recorded February 7, 1855.

In August, 1863, Cade filed his bill setting forth the above facts; that, during the treaty which resulted in his purchase, Burton always represented the disputed land as properly belonging to the Burton tract, and the question of boundary as open and unsettled; that he bought trusting to this representation; that Tate had enclosed and was claiming the disputed land;—and praying that it be decreed to belong to plaintiff; or, if Tate was protected by the prior record of his deed, that Burton should be decreed to pay plaintiff the value of the land, with rent.

On the trial, at March Term, 1866, there was evidence in support of plaintiff's allegations; also, that Burton and Watkins had agreed upon a line in 1838, giving the disputed land to Watkins, and that Tate had cleared and fenced the disputed land in the latter part of 1856 and the early part of 1857.

The defendant Burton having, in his answer, relied on the

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statute of limitations, the Court, on that subject, charged as follows :

“The statute of limitations would run against plaintiff from the time that the adverse claim of defendant and the alleged fraud of defendant were brought to his notice. Occasional acts of cutting timber on the disputed land, and such like, would not amount to notice; but such acts as fencing and clearing on so large a scale as to attract the notice of plaintiff would amount to notice; and if such notice had been given four years prior to January 19th, 1861, (the day from which the statutes of limitations are held to have been suspended,) plaintiff is barred.”

The jury found for defendant.

Plaintiff moved for a new trial, on the grounds :

1. That the verdict was against law and evidence.
2. That the above charge was erroneous.

At September Term, 1866, this motion was overruled. Plaintiff excepted, and brings up this decision for review.

AKERMAN, for plaintiff in error.

MATTHEWS and VANDUZER, for defendants.

LUMPKIN, C. J.

That Burton perpetrated a gross fraud upon Cade cannot be doubted in this case. Still, Tate is protected, and the only question is, when the suit should have been commenced by Cade against Burton. We think, by analogy, that the period of limitations applicable for the fraud is the same as that which would apply to an action for the land, to-wit: seven years from the discovery of the fraud; which was when Tate commenced clearing the land in dispute in the winter of 1856-57. Consequently, the judgment below is reversed.

NOTE BY THE REPORTER.

Seventy-one cases are reported in the foregoing pages. Some of the early volumes of the Series contain no more—not even as many. See 2 *Kelly* and 4 *Ga.*

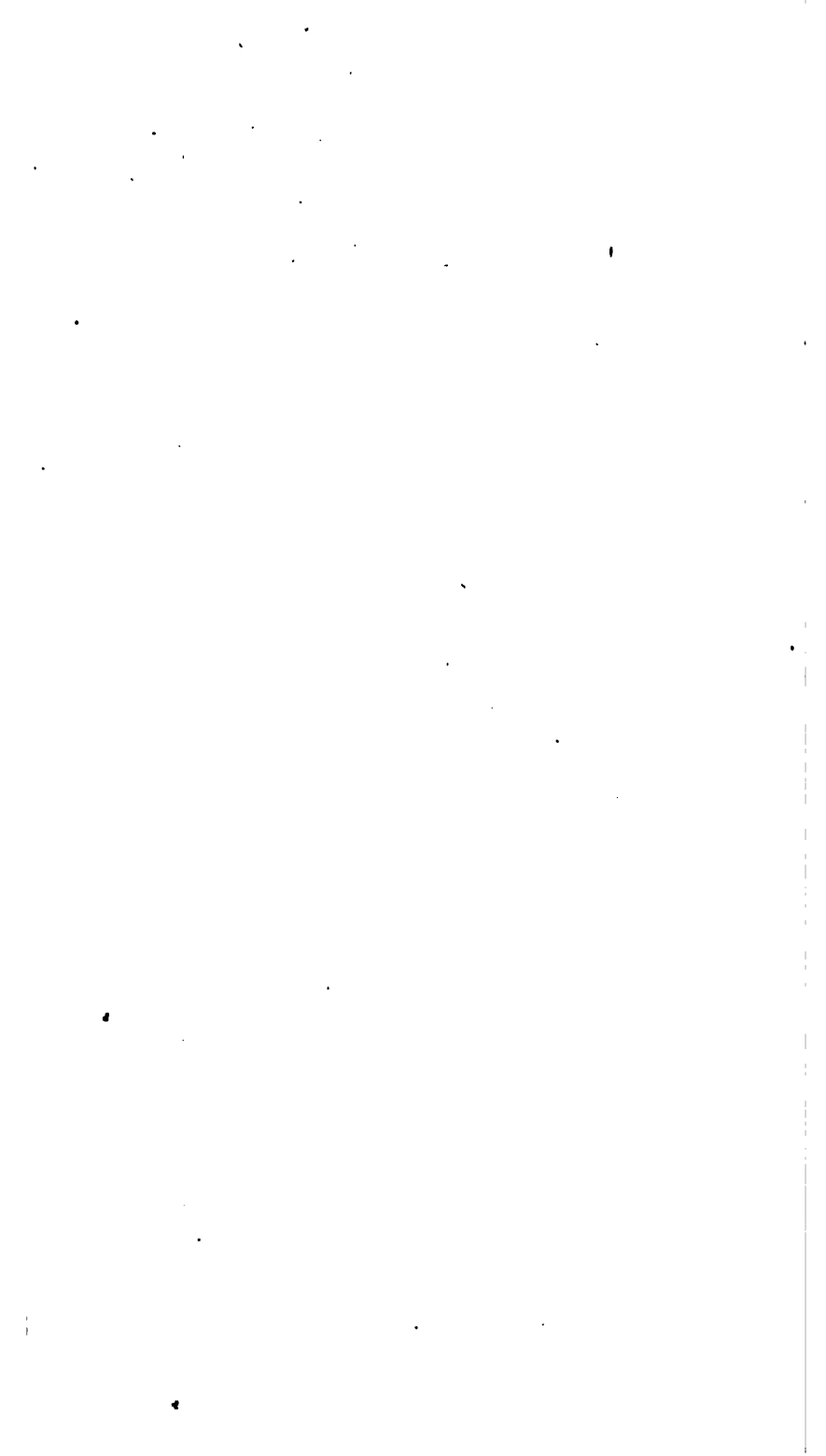
The cases decided during the period I acted as Reporter, are now all in print; consequently, I have had to collect other materials with which to give the present volume the bulk of an ordinary law book.

Fortunately, I am enabled to add an Appendix enriched with several able opinions by Judge *ERSKINE*, of the United States Courts for the State of Georgia, who, at my urgent request, has consented to their appearance in this form.

The great weight and influence of his decisions, and the growing importance of the Courts over which he presides, render even brief notes of his adjudications interesting to the Profession. Accordingly, I expect to include in the Appendix, besides his prepared opinions, all such notes as he can be induced to furnish. Nothing, however, will appear but what has undergone his revision and received his deliberate approval.

L. E. BLECKLEY.

March, 1868.



APPENDIX.

IN THE MATTER of the Oath to be taken by Attorneys and Counsellors of the National Courts, under the Act of Congress of January 24th, 1865.

Ex parte, William Law, Petitioner.

An Attorney and Counsellor, duly admitted to practice in a Court of the United States, and practicing therein, prior to the late civil war, and who has received and accepted a full pardon from the President, and taken the oath of amnesty, may resume his practice in said Court without taking the oath prescribed by the Act of Congress, of January 24th, 1865. Said Act, in its application to such a person, is unconstitutional and void.

Motion. In the District Court of the United States, for the Southern District of Georgia. Decided by Judge **ERSKINE**. At Savannah. May Term, 1866.

The facts will be sufficiently stated in the opinion of the Court as delivered by—

ERSKINE, J. William Law, Esquire, produced in Court satisfactory proof that in the year 1817, he was, by the Circuit and District Courts of the United States for the District of Georgia, duly admitted to practice as an attorney, proctor, solicitor, advocate and counsellor at the bar of said Courts, respectively; that he has been, since the year 1859, hitherto, attorney or proctor of record in the case of *Fynigan et. al. vs. The Ship Parliament*—a cause now depending on the

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Admiralty side of this Court ; that he has taken the oath of Amnesty ; that upon the promulgation by the President of the United States, of the Proclamation of May 29, 1865, he found himself within its thirteenth exception ; that he applied to the President for pardon and amnesty under this Proclamation ; and that he received a grant of pardon and amnesty, and accepted the same, and has filed in the office of the Clerk of this Court an authenticated copy of said acceptance.

Upon these proofs, Mr. Law asked to be allowed to appear and be heard in behalf of his clients in said cause, without being first required to take and subscribe the oath prescribed by the Act of Congress, approved January 24, 1865.

The petitioner was informed by the Court that this law of Congress was imperative, and could not be pretermitted. Thereupon, he submitted to the Court, that the statute was repugnant to the Constitution of the United States, and requested permission to show cause against it. This was granted, and during the early part of this term the case was fully and ably argued by the Petitioner, *propria persona*, by *Ex-Gov. Joseph E. Brown*, of the Northern District, and *Thomas E. Lloyd, Esquire*, of Savannah. The reply on behalf of the Government by *Henry S. Fitch, Esquire*, United States Attorney, to the arguments of these learned counsel, was replete with legal scholarship.

Prefatory to entering upon the examination of the various questions regularly discussed, so much of the original Act of Congress of July 2, 1862, and its supplement of January 24, 1865, as is thought essential to an easier comprehending of the grave and important inquiries now before the Court, may be cited. The original Act is entitled "An Act to prescribe an oath of office, and for other purposes." It declares that, "Hereafter every person elected or appointed to any office of honor or profit under the Government of the United States, either in the civil, military, or naval departments of the public service, excepting the President of the United States, shall, before entering upon the duties of such office,

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and before being entitled to any of the salary or other emoluments thereof, take and subscribe the following oath or affirmation :

"I, A. B., do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof: that I have voluntarily given no aid, countenance, counsel, or encouragement to persons engaged in armed hostility thereto; that I have neither sought nor accepted, nor attempted to exercise the functions of any office whatever, under any authority or pretended authority in hostility to the United States; that I have not yielded a voluntary support to any pretended government, authority, power, or constitution within the United States, hostile or inimical thereto. And I do further swear (or affirm) that, to the best of my knowledge and ability, I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter, so help me God."

And the supplementary Act provides: "That no person after the date of this Act shall be admitted to the bar of the Supreme Court of the United States, or at any time after the fourth of March next, shall be admitted to the bar of any Circuit or District Court of the United States, or the Court of Claims, as an attorney or counsellor of such Court, or shall be allowed to appear and be heard in any such Court, by virtue of any previous admission, or any special power of attorney, unless he shall have first taken and subscribed the oath prescribed in 'An Act to prescribe an oath of office and for other purposes, approved July 2, 1862,' according to the form and in the manner in said Act provided," etc.

The point having been made, whether an attorney, or counsellor at law, as such, holds a public office or place, or is to be regarded as a mere officer of the Court,—and there being a diversity of opinion among learned judges on this point,—it is proper that the views of this Court should be expressed. In Lord COKE's time, and prior thereto, an attorney—but not so a counsellor—was, it seems, considered a public officer; for he says: "That in an action of debt by an attorney for his fees, the defendant shall not wage his law, because he is compellable to be his attorney." Co. Litt. 295 a. Afterwards, however, Lord HOLT (1 Sal., 87) held, that he was not compellable to appear for any one, unless he takes his fee, or backs the warrant; and so the law has con-

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tinned in England to this day. In the following cases: *In the matter of Wood*, Hopk. 6; *Seymour v. Ellison*, 2 Cow., 13; *Merritt v. Lambert*, 10 Paige, 352; *Ray v. Birdseye*, 5 Denio, 619; and *Watts v. Whittemore*, 22, Barb. 246, practitioners of the law are said to be public officers; but in the first mentioned case only was the question up for decision. In the *Adm'rs of Byrne v. Adm'rs of Stewart*, 3 Dess. 456; *Leigh's case*, 1 Mumf. 458; *In the matter of the oaths to be taken by attorneys and counsellors*, 20 Johns, 492; *Richardson v. Brooklyn City and Newtown R. R.*, 22 How., P. R. 368; and *Cohen v. Wright*, 22 Cal., 293, they are held not to be public officers. And it was remarked by PLATT, J., in 20 Johns, 493: "As attorneys and counsellors they perform no public duties on behalf of the government; they execute no public trust."

Having collated and well considered these State authorities, I am of the opinion that the law is with the negative of the question. Nor do I think that Congress—and it is the intention of the National Legislature, as found in the statute, that guides this Court—considered them public officers. In article one, section six, cl. two of the Constitution, it is declared, that "no person holding any office under the United States shall be a member of either house during his continuance in office." Has it ever been seriously questioned that practicing as an attorney or counsellor in the Federal Courts, is inconsistent with holding, at the same time, the office of Senator or Representative in Congress? Neither was there any statutory prohibition to practicing in any of the Federal Courts until the passage of the Act of Congress, approved March 3, 1863; and the inhibition is confined to the *Court of Claims*. 12 Stats. at Large, 765. See *Amendment to Rule II. of Supreme Court United States*, 2 Wall vii.

Two questions—each of importance in the investigation of this case—spring from the preceding conclusion: Whether this Court, in admitting Mr. Law to its bar, acted judicially or ministerially? And whether, if his admission was a ju-

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dicial act, it gave him a property in his profession or office of attorney and counsellor?

The Constitution ordains that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as Congress may from time to time ordain and establish." Art. iii, sect. i. Accordingly, at the first session of Congress, an Act was passed "to establish the judicial Courts of the United States." The additional courts established by it are the Circuit and District Courts; and notwithstanding these Courts are denominated inferior Courts, they are not so considered in the technical use of that term. 4 Dall., 11; 5 Cranch, 135; 8 How., 586. The District Courts of the United States, under their own proper powers, are Courts of law and admiralty. The distinctive grades in the legal profession which prevail in England, and to a limited extent in some of the courts of this country, have no substantial recognition in the Circuit or District Courts of the United States; in these the offices of attorney, proctor, advocate and counsellor are usually combined in one person. The 35th section of the judiciary Act of 1789 declares "that in all the Courts of the United States, the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law, as by the rules of said Courts *respectively*, shall be permitted to manage and conduct causes therein."

Directly bearing upon the first of these questions is the case of *The Commonwealth ex rel, etc., of Breckenridge v. The Judges of the Court of Common Pleas of Cumberland County*, 1 S. & R., 187. A motion was made for a mandamus to be directed to the Judges of that Court, commanding them to proceed to the examination of the relator, and if found competent, to *admit* him to practice in that Court, as an attorney, etc. TILGHMAN, C. J., said, "If it becomes a question whether the rules have been complied with, the Court must decide. Can this be a ministerial act? or rather can anything be more decidedly judicial? The right of Mr. Breckenridge has been judicially decided; and if he is left

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without remedy by appeal, he is but in the situation of many other persons who have important interests decided in the court of common pleas; for many points of great importance are decided on motion, in which neither appeal nor writ of error lies." And on p. 195, YEATES, J., says, "In the admission of an attorney the court acts judicially, not ministerially." The mandamus was denied.

The case of *McLaughlin v. The District Court*, 5 W. & S. 272, was a motion for a rule to show cause why a mandamus should not issue to the district court, commanding it to *restore* the relator. ROGERS, J., announcing the opinion of the court, said: "It is ruled in *The Commonwealth ex rel., &c., v. The Judges of the Court of Common Pleas*, 1 S. & R. 187, that the admission of an attorney by a court of common pleas is a judicial and not a ministerial act, and for that reason not the subject of a mandamus. That case is an authority directly adverse to the present application; in principle there is no conceivable distinction between them. If the admission of an attorney to the bar be a judicial act, by parity of reasoning, his dismissal must be judicial also."

In the matter of the application of Henry Cooper, 8 Smith, 67, the first Head Note is in these words: "In the admission of attorneys and counsellors the Supreme Court acts judicially. The function is not of an executive character." SELDON, J., in delivering the opinion of the court, referring to *ex parte Secombe*, 19, How. 13, and to other cases, said: "If the removal or suspension of an attorney be, as was held in these cases, a judicial act, it is difficult to see how the admission of an attorney is any the less so; especially when, as here, the court in the act of admission is required to pass, not only upon the sufficiency of the evidence of certain facts, but upon the constitutionality and validity of a statute, and thus to exercise the highest judicial functions ever entrusted to a court."

The case of *Secombe* was briefly as follows: "The supreme court of the Territory of Minnesota was empowered by a Territorial statute to remove any attorney for wilful mis-

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conduct. Under this law Mr. Secombe was removed; and the order for removal set forth the cause. He presented a petition to the Justices of the Supreme Court of the United States, praying a mandamus to the supreme court of the Territory, commanding it to vacate the order. The prayer was denied. And Chief Justice TANEY, in giving the unanimous opinion of the Court, said: "The removal of the relator, therefore, for the cause above mentioned, was the act of the Court done in the exercise of a judicial discretion, which the law authorized and required it to exercise." And on page 15, he remarks: "The Court, it seems, were of opinion that no notice was necessary, and proceeded without it; and, whether this decision was erroneous or not, yet it was made in the exercise of judicial authority, where the subject-matter was within their jurisdiction, and it cannot therefore be revised and annulled in this form of proceeding." See also *ex parte Burr*. 9, Wheat., 529.

The authorities from which these quotations are taken, are in themselves sufficient and conclusive to show, not only that the admission of an attorney, or counsellor, but likewise his suspension, or disbarment, is a judicial act or judgment. The admission of an attorney, or counsellor, where no fraud has been practiced on the Court, gives him the office for life. This privilege, franchise, or right to practice in the Court, has annexed to it the condition that his character shall continue fair, and that he will not abuse his office by criminal or immoral conduct. As an attorney, or counsellor, in my judgment, does not hold a public office or place, there is no forfeiture for nonuser:—for if he chooses to practice his profession, he may do so; if not, not; he may withdraw from the practice and resume it at pleasure; he may be raised to the Bench, as was the petitioner himself,—and where, from 1829 to 1835, in our highest State judicial tribunal, he presided with great learning and honor—and return to the bar again. *Vide. In the matter of Dormenon*, 1 Mar. 129. Carthew, 478.

The second question is, whether the petitioner, by virtue

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of his admission to the bar of this Court, has a property in his profession or office? The case of *The Adm'rs of Byrne v. The Adm'rs of Stewart*, arose on a statute which inhibited persons holding certain offices under the State from practicing in the courts. The chancellor, in his opinion, remarked: "But the objection of most weight is, that this act, as it affects the defendant, will deprive him of a right which may fairly be considered a species of property. It cannot be denied that a man's trade or profession is his property, and if any law should be passed avowedly for the purpose of restraining any member of the bar, who is not a public officer, from exercising his profession, I should declare such law void." In 20 Johns. R. 492, the court say, that attorneys and counsellors "exercise a privilege or franchise." And ORMOND, J., in the case of *Dorsey, supra*, in speaking of the right to practice law, asked: "Can it be seriously contended that it is not a valuable right, and as deserving of protection as property?"

In the matter of John Baxter, decided at the May Term, 1865, of the Circuit Court of the United States for the Eastern District of Tennessee, TRIGG, J., construing the Act of Congress of January 24, 1865, said: "For if he" [the attorney] "neglects or refuses to take the prescribed oath, he is as effectually deprived of his office and the fees and emoluments thereof, as he could be by a forfeiture of the same upon a regular trial and conviction by *due process of law*, for the offences mentioned. These fees and emoluments," continues the judge, "are as much the *property* of the attorney as any choses in action can, in law, be the property of any other citizen; and, being property, the law in question, to the extent mentioned, punishes the attorney by a *forfeiture* of his property." *Opinion of the Honorable Connally F. Trigg*, Pamph. p. 10. Memphis, Tenn., 1865. This case and *Cohen v. Wright*, are the only reported cases that I have seen, in which this question came regularly before a court. In *Cohen v. Wright*, the Court, CROOKER, J., delivering the opinion—in which NORTON, J., specially concurred—said: "The right

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to practice law is valuable to the possessor only. It cannot descend or be inherited, bought or sold, conveyed or transferred, can be divested and destroyed by mere order of the court, is subject to forfeiture by mere loss of moral character on the part of the possessor, and cannot, therefore, in any proper sense be deemed 'property,' or amount to a 'contract,' in the Constitutional meaning of those terms." But the courts in approaching this conclusion, say: "If the right of the attorney to practice law is property, within the clear intent and meaning of the constitution, there is much force in the position that the statute by depriving him of the right, without a judicial investigation, such as is usual in cases of that kind, violates this provision. Still it is not so clear as to be beyond a doubt, for it can hardly be said that he is 'deprived' of any thing when the law leaves it open to him to resume his privileges at any time by taking the oath, a failure to do which is his own fault." In another part of this opinion this oath will be transcribed and referred to.

Comparing the ruling of the United States Circuit Court, on this point, with that of the supreme court of California, it will be seen that the views of these Courts are opposed; at least, there is some diversity of opinion. The former Court shows that an illegal result follows, by reason of the Act of Congress depriving the attorney of his office. In other words, if the attorney will not, or cannot take the oath, the statute itself deprives him of the fees and emoluments becoming due to him while in possession of his office under the sanction of the Court. The latter Court—if my interpretation is not erroneous—holds that no unlawful consequence follows, because the attorney has no property in his office, in the constitutional sense of that term.

That an attorney, or counsellor has a property in his fees and emoluments by the common law, or by contract expressed or implied with his client, and legal modes of recovering the same, is well established. 1 Bac. Ab. *Attorney* (F.) 2 Gr. on Ev. sec. 139: 14. Geo. 87.

The first division of the last clause of the fifth article of

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the Amendment to the Constitution of the United States, ordains that no person shall "be deprived of life, liberty or property without due process of law." This declaration exhibits a summary of all the antecedent precautions contained in this article, and it places property in the same category with the more exalted blessings of life and liberty. Where property is possessed or owned by a person under existing laws, or where he has secured to him, by judicial authority (as in the case of an attorney or counsellor) the right or privilege to acquire and own property by his professional skill and industry, (supposing this right or privilege of future acquisition and ownership is, under the provision of the Constitution, property, and therefore, equally protected with property over which the owner has prehensible power,) then he cannot be deprived of the property, nor can the right, privilege, or franchise mentioned be extinguished, by the declaration of Congress, *per se*. And if he has forfeited either, the facts must be ascertained by due process of law, before the judicial tribunals of the country.—

Vide Murray's Lessee et al. v. Hoboken Land and Improvement Company, 18 How. 272.

Whether, when an attorney or counsellor is, by the Court, regularly licensed and admitted to practice law, this bestows upon him a property in his profession or office, is a question so interwoven with nice distinctions, that it is far from being easily resolved; but the present inclination of my mind is that it is not property, in the sense and import of that word or term as used in the Constitution; still, it is a right, privilege, or species of franchise under the immediate sanction and protection of the Court. I do not, however, entertain the remotest doubt of the power of Congress, acting within the limits of its Constitutional authority, to prescribe by law who may be attorneys or counsellors of the national Courts, their qualifications, mode of admission, suspension and disbarment.

SELDON, J., in *Waynehamer v. The People*, 3 Ker., 433, gave the following definition of property: "Property is the

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right of any person to possess, use, enjoy and dispose of a thing. The term, although frequently applied to the thing itself in strictness means only the rights in relation to it, (*Bouvier's Law Dic.*; 1 *Bla. Com.*, 138; *Webster's Dic.*)" And, indeed, after a most careful examination of all the authorities within my reach, I have failed to discover a definition of property stripped of the attributes of enjoyment and alienation. *Grotius*—Book 2, ch. 6, sec. 1, says: The exclusive right of using and transferring property follows as a natural consequence from the perception and admission of the right itself.

The petitioner having brought into Court a charter of full pardon and amnesty, granted to him by the President of the United States, and filed with the Clerk an authenticated copy of his acceptance of the same, urged that this act of Executive clemency relieves him from being required, before he can appear and be heard as an attorney or counsellor in this Court, to take and subscribe the oath prescribed by the Act of January 23, 1865, because, as he says, this pardon and amnesty has restored him to all the rights subject to forfeiture by reason of his having "voluntarily participated in the rebellion." The Constitution (Art. ii., sec. ii, cl. 1), affirmatively vests in the President of the United States the sole power to grant reprieves and pardons, except in cases of impeachment. And the very nature and necessity of such an authority in every government, arises from the infirmities incident to the administration of human justice.

In *ex parte Wells*, 18 How., 307, Mr. Justice WAYNE, in delivering the opinion of the Supreme Court of the United States, made use of the following language: "Without such a power of clemency, to be exercised by some department or functionary of a government, it would be most imperfect and deficient in its political morality, and in the attributes of Deity, whose judgments are always tempered with mercy." Mr. SPEED, Attorney-General of the United States, in his Opinion of May 1, 1865, elucidates in a masterly manner, the Constitutional power of the President to grant pardon and

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amnesty. And in defining these terms, he says: "A pardon is a remission of guilt; an amnesty is an act of oblivion or forgetfulness. They are acts of sovereign mercy and grace, flowing from the appropriate organ of the Government.—There can be no pardon where there is no actual or imputed guilt.—The acceptance of a pardon is the confession of guilt, or of the existence of a state of facts from which a judgment of guilt would follow." In a subsequent part of the Opinion he remarks: "After a pardon has been accepted it become a *valid* act, and the person receiving it is entitled to all its benefits." Afterwards he says: "Persons who have been constantly engaged in rebellion, should know distinctly what they are to do, when and how they are to do it, to free themselves from punishment, in whole or in part, or to re-instate themselves as before the rebellion." In 12 Mod. R., 119, it is held that "Where a crime is pardoned, all the effects and consequences thereof are also discharged."

I will not venture to illustrate or expand these citations, or to discuss this subject at length, but will bring my remarks to a close in a very few words. The language of the Act is explicit; and although it applies to a single order of persons only, it is gratuitous to say that it was the intention of Congress to limit the oath to any particular individual or class of this order; the plain words of the Act are, that it shall comprehend every attorney or counsellor upon his admission to the bar of a national Court, or who had been admitted previous to the 4th of March, 1865. Yet the effect of the statute is, that while of force, neither pardon nor amnesty avail the petitioner, so as to make him a "new man." 4 Bla. Com. 402.

Was this result—this impossibility—foreknown to Congress?

Admit that this statute is of the character contemplated by Sir WILLIAM BLACKSTONE. "But where," says that author, "some collateral matter arises out of the general words and happens to be unreasonable, there the judges are, in decency, to conclude that this consequence was not fore-

seen by the parliament, and, therefore, they are at liberty to expound the statute by equity, and only *quoad hoc* disregard it." 1 Com. 91. What is said by the Commentator relates to the British constitution; but whether such reason alone, for setting aside a statute, or any portion of it, would obtain in this country, is very questionable. See IREDELL, J., in *Calder v. Bull*, 3 Dall., 386; *Cochran v. Van Surly*, 20 Wend., 381; *The City of Bridgeport v. The Housatonic Rail Road Company*, 15, Conn., 475; *Parker v. Commonwealth*, 6 Barr, 507. But vide *Ross' case*, 2 Pick., 165; remarks of PARKER, C. J.

Chancellor KENT. (1 Com., 448,) says: "If there be no constitutional objections to a statute, it is with us as absolute and uncontrollable as laws flowing from the sovereign power under any other form of government." Here we have a written Constitution, forming the paramount and fundamental law of the nation, wherein is designated the powers and duties of the national Legislature, as well as of the other departments of the government; therefore, it must follow as a consequence, that none of the co-ordinate branches can infringe the power of any of the others—each division, legislative, executive, and judicial, must remain confined within its own Constitutional limits.

It was ingeniously argued by one of the learned counsel, ex-Gov. Joseph E. Brown, that this Act imposes a penalty which cannot be remitted, and inflicts a punishment beyond the reach of Executive clemency. Whether this statute really passes the Constitutional boundary, and is subversive of the pardoning power of the President, is a question of so nice and delicate a nature, that the solution of it would demand the most profound consideration; but, as the case before the Court does not absolutely require this question to be resolved, it will not be attempted. See Story on the Constitution, sec. 1498.

On the part of the petitioner it was contended that the Act of January 24, 1865—(in which the oath of office of July 2,

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1862, may be, by relation, considered as embodied) —is in the nature of a bill of attainder.

Bills of attainder are statutes enacted by the supreme legislative power, *pro re nata*, inflicting capital penalties, *ex post facto*, without conviction in the regular course of administration through courts of justice.

But it has been contended in argument that the person or persons to be affected must be named in the bill, otherwise it is not a statute of this character. Dr. Wooddeson in his *Vinerian Lectures*, 13 Law, Lib. 510, lends a general substantiation to this position. He says: "It has been usual in times of domestic rebellion to pass acts of parliament inflicting the penalties of attainder on those *by name*, who had levied war against the king, and had fled from justice, provided they should not surrender by a day prefixed." Acts of attainder were generally framed in accordance with the foregoing extract, but not always so; for there are in the statute books, both of England and of Ireland, many statutes of attainder wherein whole classes of people, in bulk, were attainted, adjudged and convicted of high treason, without being named or otherwise legally designated; and without being called, arraigned, or tried. But a distant allusion alone to these bills of attainder,—and which, in several material respects, differ from those mentioned by Wooddeson, and other writers,—is not sufficient to an understanding of the grave question under immediate examination; therefore, so much of such of them as may direct to a legitimate legal conclusion, may not inaptly, I think, be transcribed. At a Parliament held at Westminster, the statute of 26 Hen., viii., c 25, 3 Stats. of the Realm, 529, was passed. It is entitled "An Act concerning the Attainder of Thomas Fitzgaralde, Erle of Gildare." It attaints first the Earl of high treason and deprives him of his estate, title, etc. Sec. II declares, "That all such persons which be or heretofore have been comforters, partakers, abettors, confederates, and adherents unto the said Erle in his said false and traitorons acts and purposes, shall, in likewise stand and be attainted, adjudged

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and convicted of high treason." By sec. III, it is provided, "That the same attainder, judgment, and conviction against the said comforters, partakers, abettors, confederates and adherents, shall be as strong and effectual in law against them, and every of them, as though they, and every of them, had be (*sic*) specially, singularly and particularly named by their proper names and surnames in this said Act." Sec. IV enacts, that as well the said Earl, as other his said comforters, abettors, etc., "shall have and suffer execution of death for the same accordingly." Sec. VII, provides, that the attainder is not to be "hurtful or prejudicial," if they submit by a pre-signified day to the king or his lieutenant.

This boon is denied in the next bill of attainder against Kildare, his uncles, and adherents. It will, therefore, be cited to show the terrible severity of some of the attainders.

Some two years subsequent to the enactment of the preceding, the 28 Hen., viii, c 18, *Id.* 694, was passed. This statute is entitled, "An Act concerning the Attainder of Thomas Fittzgaralde, and of his V Uncles." First reciting the 26 Hen., viii, c 25, it declares that, "The said Thomas, late Erle of Gyldare, by whatsoever name or names he be called; James Fittzgaralde, *Knight*; John Fittzgaralde; Richard [Fittzgaralde]; Olyver Fittzgaralde; and Walter Fittzgaralde, be attainted, adjudged and convicted of high treason;" * * * * and that the said Thomas shall loose his title, dignity and estate of Earl of Gyldare. Section II, as in the preceding Act, attaints "all such persons which be or heretofore have been comforters, abettors, partakers, confederates or adherents unto the said James Fittzgaralde, late Erle, or unto his said uncles, and every of them. Section III. "And be it further enacted, by the authority aforesaid, that the same attainder, judgment, and conviction against the said comforters, abettors, partakers, confederates and adherents, shall be as strong and effectual in law against them, and every of them, as though they and every of them, had been specially, singularly and particularly named by their proper names and surnames in [the] said Act." Sec-



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tion IV. "And be it further enacted by the authority aforesaid, that as well the said Thomas, late Erle, James Fitzgaralde, *Knight*: John Fitzgaralde; Richard Fitzgaralde; Olyver Fitzgaralde; and Walter Fitzgaralde, now being in the Tower of London, for their said treason, and every of them, as the said comforters, abettors, partakers, confederates and adherents, and every of them, shall have and suffer execution of death for the same accordingly," * * * and shall forfeit their estates, etc. "And that they, and every of them, for their said false and traitorous offenses, shall loose the benefit, liberation, and privilege of all sanctuaries."

Shortly after the passing of this attainder—and without any trial whatever—the young Kildare and his five rebel uncles were hanged at *Tyburn*. *Herbert's Life and Reign of Henry the Eighth*. P. 491. Ed. of 1682.

In Bishop Burnet's history of the Reformation, 1—Part 2—243, ed. of 1825, is printed at length, Parliamentary Roll, Act 60, *anno regni tricesimo secundo*, Henry 8, and this statute enacts, *inter alia*, that Thomas, late Earl of Essex, "shall be and stand by authority of this present parliament, attainted and convicted of heresy and high treason, and shall be adjudged an abominable and detestable traitor, and shall have and suffer the pains of death." He was executed without more ado.

The 24th Eliz., ch., 1 *Irish Stats. at Large*, 391, attainted and convicted James Eustace, late Viscount Baltinglas, and his brothers, Edmund, Thomas, Walter, and Richard, of high treason; and by sec. II., prescribed as follows: "That as well the said James, and all others the said offenders and persons before named, as SUCH OTHERS who by actual rebellion, and other traitorous practices have committed like abominable and detestable treason and rebellion, and have died and been slain in their said actual rebellion and treasons, or otherwise been, by martial law, executed for the same, and every of them, for said abominable and detestable treasons, by them and every of them, most abominably

and traitorously committed, perpetrated and done against your highness," etc., "shall be, by authority of this present parliament, convicted and attainted of high treason. And that as many of the said offenders and persons before named, as be yet in life, shall and may, at your highness' will and pleasure suffer the pains of death as in cases of high treason," etc.

Here the living and the dead alike were attainted and convicted. Many other acts might be cited, in which deceased persons were attainted. Let one (and it is the last of the kind, I believe,) suffice: The 12 Car., ii c. 30, attainted the remains of the great Lord Protector CROMWELL, and others who had sat in judgment on Charles the First. And by order of the parliament they were taken out of their graves and hanged in their shrouds. 1 Pepys Diary, 149. Ed. 1854.

The foregoing citations are amply sufficient to show (among other matters pertinent to this subject) that to constitute a statute of attainder, it was not necessary to name the persons accused, nor to call upon them to appear and defend before judgment.

Other occasional acts of parliament of a kindred nature to bills of attainder—but which inflict a punishment milder than death—known as bills of pains and penalties, will be noticed. Treason itself has, in some instances, been punished by these statutes, as in the case of Lord Monson, Sir Arthur Haselrig and others, who had been members of the High Court of Justice. 12 Car., ii, c. 11, secs. 38 and 39. The 19 Car., ii., c. 10, adjudged the Earl of Clarendon a banished man for life, if he did not return to England within a certain period, and surrender himself for trial. The 9 Geo., 1, c. 18, 5 Stats. at Large, 477, ordered Bishop Atterbury to depart the realm on, or before, a fixed day; sentenced him to perpetual exile, and made it felony in him to return; and deprived him of all his offices, dignities, etc. This bill was passed, on what was, at the time, a bare supposition, that he was conspiring to bring in the Pretender.

Of the nature of bills of pains and penalties, and also

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closely allied to more than one of the acts of attainder quoted, are those statutes which despoiled certain portions of the people,—and in one memorable instance a whole community, in gross,—of their civil rights, without denominating by name, or other legal special manner, the persons to be affected, or summoning them to appear and defend. The 22 Geo., iii., c. 31, disfranchised all the electors of Crickdale below a certain yearly rental. By the 1 and 2 Geo., iv., c. 47. 8 Stats. (U. K.) at Large, 358, the entire body of voters of Grampond were deprived of their electoral privileges.

In England a distinction is taken between bills of attainder, and bills of pains and penalties; but when carefully noted and compared they will be found akin, and in close fellowship; and the following extract will prove the nearness of their identity. While the bill to inflict pains and penalties upon John Plunkett, was pending before the House of Lords, it was ordered by that House, that the opinion of the judges be asked, “Whether if John Plunkett shall, after the passing of this bill, be indicted for the treasons of which he stands charged in this bill, he can plead this act in bar of such indictment?” And the judges, through the Chief Justice, answered: “That, if the said bill should pass into a law, he may plead the same in bar of such indictment.” 16 State Trials, 365. If the Act of Congress of January 24, 1865, or any part of it, be in the nature of a bill of attainder, and as such would effect the petitioner, it cannot be deemed any the less so because he is not named in it. And like reason would hold good, if it be technically, or in the nature of a bill of pains and penalties. *DUE* on the Constitutional Jurisprudence of the United States, Lect. xi. Mr. Justice STORY says: “But in the sense of the Constitution, it seems, that bills of attainder include bills of pains and penalties; for the Supreme Court have said “A bill of attainder may affect the life of an individual, or confiscate his property, or may do both.” Story on the Constitution, sec., 1338, citing, *Fletcher v. Peck*, 6 Cranch., 138, and 1 Kent, Lect. xix.

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Whether the Act of January 24, 1865, is in the nature of a bill of attainder was a point in judgment *In the case of John Gill Shorter, and other attorneys, for leave to practice in the Circuit and District Courts of the United States, for the District of Alabama, without first complying with the requirements of said statute.* And BUSTEED, J., in an opinion marked by precision and force, said: "Does it not in fact disfranchise the class of men known as lawyers, under the pain of not taking the oath it prescribes? Is not this the logical and necessary consequence of their refusal? Does it not disfranchise them when it requires them to take the prescribed oath, before they can exercise their vocation? Is it not an assumption by the legislature of judicial magistracy? Is it not "pronouncing upon the guilt of the party without any of the common forms and guards of trial?" *Decision of the Honorable Richard BUSTEED. Mobile Register and Advertiser, Dec. 17, 1865.*

Bestowing upon this particular question the utmost care and solicitude—and with unfeigned regret of my inability to discuss it in a manner answerable to its gravity—I cannot regard the retrospective part of this oath otherwise than as a bill of pains and penalties—possessing the characteristic attributes of a bill of attainder, except the death penalty. In the arbitrary, technical sense it may not be so called; but when it is so plainly observable that by its own inherent force it effectuates the destruction of the rights of a large order of persons, and is substantially and in effect a bill of pains and penalties, I know no other term in our language adequate to express it. By operation of the legislative will alone, the petitioner is already adjudged—adjudged without due process of law; and, although forthcoming, not called to trial, according to the general laws of the land; the statute affecting his person as directly and accurately, as though he were named in its body—disenabling him from appearing or being heard, as an attorney or counsellor, at the bar of this Court, and thereby depriving him of the right to acquire and own property, by his professional skill and labor.

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But if the conclusion at which I have arrived is erroneous, and the retroactive clauses of the oath do not contravene any portion of the Constitution of the United States, still he is encompassed by an impassible barrier during the remainder of his days, or until these supposed obnoxious clauses of the oath are modified or repealed by Congress.

The following additional objections were presented: First, that the Act of Congress of January 24th, 1865, is a penal law. This may be disposed of at once. After a careful analysis of this statute, and perceiving, as I apprehend, the manner in which it necessarily affects the party now before this Court, it seems clear, on principal and on authority, that the several retrospective divisions of the oath are highly penal. The following cases are referred to, in support of this expression: *Leigh's case*; *Dorsey's case*; *In the matter of Shorter et. al.*; *In the matter of Baxter*. Agreeing with these authorities, this question may be considered settled, so far as this Court is concerned, until such time as the Supreme Court of the United States shall have decided it otherwise.

The *second* objection taken was, that the Act is in violation of so much of the ninth section of the first article of the Constitution as declares that no "*ex post facto* law shall be passed;" and also that it contravenes that clause of the fifth section of the first article of the amendments to the Constitution, which prohibits any person from being compelled, in any criminal case, to be a witness against himself, or being deprived of life, liberty and property without due process of law.

In the case of *Leigh, supra*, Mr. Leigh applied to the Supreme Court of Appeals of Virginia for admission to its bar. But he was met by a statute of that State, requiring "every person who shall be appointed to any office or place, civil or military, under the commonwealth, shall, in addition to the oath now prescribed, take the following oath," to-wit: "That he hath not been engaged in a duel by sending or accepting a challenge to fight a duel, or by fighting a duel, or

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in any other manner in violation of the act 'entitled an Act to suppress duelling,' since the passage thereof;" and further, that he will not be concerned directly or indirectly in such duel, during his continuance in office. *Id.* 485. The point for judgment in this case was, whether practitioners of the law were public officers? TUCKER, J., was of opinion that they were. But ROANE, J., and FLEMING, C. J., decided otherwise. Mr. Leigh was admitted without taking the additional oath. The majority of the court, in their opinions, animadverted upon the statute in very expressive terms. ROANE, J., said: "It is unusually *penal*, if not tyrannical, in compelling a party to stipulate upon oath, by the 3d section, not only in relation to his past conduct, and present resolution, but also for the future state of his mind." And the Chief Justice—after remarking that it was an "oath unknown to the laws of the State, or of the United States"—adds: "I cannot but consider it a penal statute, and as *such* must give it a strict interpretation."

In the matter of John Dorsey, supra. On the seventh of January, 1826, the Legislature of Alabama passed an Act, commanding all public officers, and attorneys and counselors at law, before entering upon the duties of their offices or stations, to take the following oath, to-wit: "I do solemnly swear that I have neither directly or indirectly, given, accepted, or knowingly carried a challenge in writing or otherwise, to any person or persons (being a citizen of this state) to fight in single combat, or otherwise, with any deadly weapon, either in, or out of the state, or aided or abetted in the same, since the first day of January, 1826;" and that he will not hereafter give, accept, or knowingly carry a challenge, etc. "And any attorney or counsellor at law, failing or refusing to take the said oath, shall not be permitted to practice, as such, in any court of this state."

The validity of this Act came regularly before the court, and a majority of the members decided the retroactive portion of the oath to be unconstitutional and void. COLLIER, C. J., dissented. GOLDTHWAITE, J., in delivering the opinion,

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said: "I have given the subject the consideration demanded by its importance as a constitutional question, and am convinced that one part of the oath imposed by the general assembly, usually called the duelling act, is inhibited by the constitution. As the oath is not divisible, and is, in part, unwarranted by the fundamental law, in my opinion, we ought not to require it to be administered." ORMOND, J., said: "This is a highly penal law; it excludes, unless its terms are complied with, all persons from practicing as attorneys and counsellors at law in the courts of this state." On p. 380, he says: "The tenth section of the bill of rights, among other things, provides that no one 'shall be compelled to give evidence against himself, nor shall he be deprived of his life, liberty, or property, but by due course of law.' After a patient and mature examination of the matter, I am of opinion that the requisitions of the expurgatory oath, exacted by this law, offends against this portion of the bill of rights."

The case of *Cohen v. Wright*, *supra*, arose on an Act, passed April 25, 1863, by the legislature of California, entitled "*An act to exclude Traitors and Alien Enemies from the Courts of Justice in Civil Cases.*" The 3d section of the Act reads: "No attorney at law shall be permitted to practice in any court in this state until he shall have taken, and filed in the office of the county clerk of the county in which the attorney shall reside, the oath prescribed in this act; and for every violation of the provisions of this section, the attorney so offending shall be considered guilty of a misdemeanor, and on conviction shall be fined in the sum of one thousand dollars." The following is the form of oath to be taken by plaintiffs, defendants, and attorneys, to-wit: "I [here insert the name of the plaintiff] do solemnly swear that I will support the Constitution of the United States, and the constitution of the state of California; that I will bear true faith and allegiance to the Government of the United States, any ordinance, resolution, or law of any state, or territory, or of any convention or legislature thereof, to

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the contrary notwithstanding; that I have not, since the [here insert the date of the passage of this act] knowingly aided, encouraged, countenanced, or assisted, nor will I hereafter, in any manner, aid, encourage, countenance or assist the so-called Confederate states, or any of them, in their rebellion against the lawful Government of the United States; and this I do without any qualification or mental reservation whatsoever." The first and second clauses of the oath state, in plain terms, that the affiant will support the Constitution of the United States, and the constitution of the state of California. "The next clause," says Mr. Justice CROCKER, in delivering the opinion of the court, "that the party has not, since the passage of the act, and will not aid, encourage, countenance or assist those now in rebellion against the United States, is a solemn declaration or pledge; a declaration that the party has not committed since the passage of the law, and a pledge that he will not commit any treasonable act against the National Government. So far as it is a pledge of future good conduct, it is but expressing in another form that he will support the Constitution, and bear true allegiance to the United States, and to that extent clearly is not opposed to this section" [Art. ii, sec. iii] "of our state constitution. So far as it is a declaration of past conduct, it seems to go beyond the strict letter of the constitutional oath, and we have, therefore, had a doubt of its validity. It does, however, but carry out the object, design, and spirit of the constitutional oath; and as it is not an unreasonable requirement, being confined to acts since the passage of the law, and does not clearly violate the constitution, we are unwilling to declare it void on a mere doubt." "The act," say the court, toward the close of this branch of the case, "is not retrospective, as it merely requires the party to swear that he has not committed any treasonable act *since* its passage. It does not relate to any act done *before* that time."

In the matter of Baxter, supra, TRIGG, J., said: "Now, assuming that Mr. Baxter has been guilty of some one or

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more of the acts enumerated in the prescribed oath, or rather in the *law* we are considering, (for the oath, as before stated, must be considered as incorporated in the body of the act,) the question then arises: Does this law of Congress render the act committed *punishable* in a manner in which it was not punishable when it *was* committed? Does it affect him, by way of *punishment* of the act, either in his person or his estate, *differently* from what it would have done before the passage of the law, and at the time the act was committed? If it does, then, under the authorities before cited, it is an *ex post facto* law, and, being repugnant to the Constitution, is void." And in the next paragraph the Judge says: "But this law *extends* the punishment of the attorney, by virtually depriving him of his office in the Courts, and thereby forfeiting whatever of the emoluments of his profession he may be entitled to upon contracts with his clients for services to be rendered, or which have been in part performed and not yet completed. * * * And the effect of the law being thus penal in its consequences, and *punishing* the attorney for the acts mentioned in the oath, in a manner in which they were *not* punishable, when committed, then, tested by the principles laid down in the Cases of *Calder v. Bull* and *Fletcher v. Peck*, I am constrained to declare that the Act in question is opposed to the Constitution of the United States, is *ex post facto* in its operations, and therefore not a valid law." Pamph. 10.

BUSTED, J., in *Shorter et. al., supra*, declared the Act to be "highly penal in its general scope and effect." The Judge also determined it to be *ex post facto*; and gave the following cogent illustration in support of his decision on this point: "One of the clauses in the act of Congress of the 2d of July, 1862, and which is embraced in the oath required by the act of January 24, 1865, is as follows: 'That I have neither sought, nor accepted, nor attempted to exercise the functions of any office whatever, under any authority, or pretended authority, in hostility to the United States.' This abjuration is not confined to any period. It covers the life

time of the affirmant. Before the 24th of January, 1865, a British subject could be admitted to all the rights of citizenship in the United States by taking the oaths of naturalization. Without being naturalized, he might be admitted to the bar of this Court upon complying with the rules of the Court. But if, during the period of war between the United States and Great Britain, half a century ago, he had held office in the kingdom of which he was a native and was then a subject, he could not comply with the requisitions of this statute, and could no longer exercise his privilege as a member of the bar of this Court. The right acquired by his naturalization, and by the rules and orders of the Court, would be annulled by a law *ex post facto*, and for an act innocent, or even praiseworthy, when it was done."

It was likewise the opinion of the Court that the statute compelled the party to be a witness against himself. "It is unworthy of the great question," observed the Judge, "to say that a man is not obliged to put himself in the supposed dilemma; that all he has to do is not to attempt the practice of his profession in the National Courts, and he will not run the risk of testifying to his own guilt. This is the merest and the shallowest sophistry. If he keep silence, he is thereby deprived of a constitutional right; if he speak, he becomes a 'witness against himself.' Judgment of condemnation instantly follows the coerced acknowledgment of guilt, and an act of the legislature is thus made to take the place and exercise the functions of the judicial office. Now, if Congress may bring about such a result to a man, is it not doing, by indirection, what it is expressly prohibited from doing directly?"

Concurring in the decision of the United States Circuit Court in the case of *Baxter*, and that of the United States District Court in *Shorter et. al.*, it might seem unnecessary to offer further or other argument on subjects which have already been so satisfactorily treated; but as the same questions which arose before those tribunals were also discussed

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here, it is due to counsel that the views of this Court be signified ; little, however, can be added.

In *Fletcher v. Peck*, 6 Cranch, 138, it was said by the Supreme Court of the United States that an *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. "This definition," says KENT, "is distinguished for its comprehensive brevity and precision, and it extends to laws passed after the act, and affecting a person by way of punishment of that act, either in his person or estate." 1 Kent, 409. And the Supreme Judicial Court of Massachusetts, in *Ross'* case, say: "Adding a new punishment, or increasing the old one for the same offence, would be *ex post facto*." 2 Pick., 165. "*Ex post facto* laws relate to penal and criminal proceedings." 1 Kent, 409. Carefully observing the foregoing definitions, it may be said that an *ex post facto* law is a retroactive penal or criminal law, and no other.

The design and object of a law is to regulate conduct, to prescribe and fix a rule or guide for it ; and, therefore, a law attempting to regulate past conduct undoes itself, and involves an inconsistency, a contradiction, and an absurdity. The attaching of a new or cumulative consequence to a past transaction does not regulate it, for a by-gone act is beyond the reach of regulation. Sir William BLACKSTONE says that all laws should be made "to commence *in futuro*, and be notified before their commencement, which is implied in the term 'prescribed.'"

There are several clauses, or divisions, in the retrospective portion of the oath ; the first is as follows : "I do solemnly swear (or affirm) that I have never voluntarily borne arms against the United States since I have been a citizen thereof."

If a citizen of the United States, or an alien while he or his family and effects are under the protection of the government, voluntarily bears arms against the United States, it is a levying of war against them ; and this is treason, the heaviest and most atrocious offense known to the law ; it is

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the sum of all crimes, for it is committed against the duty of allegiance.

By observing this clause, it cannot but be noticed that, although it is couched in negative language, it nevertheless implies, affirmatively, that the party taking the oath may have borne arms against the United States within the period during which he has been a citizen. He does not swear positively that he has not borne arms against the United States since he has been a citizen thereof; but, on the contrary, his oath is pregnant with the admission that he has; and so, by implication, he inculpatates himself, and at the same moment exculpates himself by testifying that he did not commit it *voluntarily*; and thus, the facts and the law being blended, he swears to matter of law, or rather to a conclusion of law.

It is a well settled rule, and knows no exception, that an act done from compulsion or necessity is not a crime; but the *degree* of necessity that will excuse is often, however, a nice matter to decide. *Respublica v. McCarty*, 2 Dall., 85, *United States v. Vigol*, *id.* 346. 1 Russ. on Crimes, 664; 665; 1 Bishop on Criminal Law, secs. 441 to 448. Allison Crim. Law, 627, 673; 1 Hume Crim. Law, 50, 51. *The Argo*, 1 Gall. 150, 157. *The New York*, 3 Wheat. 59.

It is in evidence, as has been seen, that Mr. Law, the petitioner, fell within the 13th exception of the Proclamation of May 29th, 1865, and that he received and accepted a grant of pardon and amnesty from the President of the United States. This grant was inspected by the Court and declared to be a valid act, and that the recipient ought to have the full legal benefit of it.

Now, if this pardon, in addition to absolving the offence, also restores to him property, not judicially condemned to the United States, by parity of principle, it likewise restores to him his property, or right of property, in the fees and other emoluments accruing to him for professional services as an attorney, proctor, &c.

Suppose a member of the bar were indicted for

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because of his having levied war against the United States, and he brings into the Circuit Court before which he stands charged a pardon for the offence, and he pleads it in bar, or by other proper mode presents it for judgment on arraignment or during trial ; or after verdict, in arrest of judgment ; or after judgment, in bar of execution ; and his plea or motion is allowed, and he goes without day, is not this the end ? By this, are not all the effects and consequences of the crime discharged, and the party become a " new man " ?

But, notwithstanding the accused has the benefit of the pardon adjudged to him by the Court, yet he cannot be permitted to appear and be heard in any Federal Court, unless he shall have taken and subscribed an oath, (which oath is already quoted,) the first clause, as already mentioned, is, in substance, that he has never voluntarily borne arms against the nation since he has been a citizen thereof. In this clause, as is perceived, is inclosed the fact that he did not voluntarily commit the very offence for which he stood indicted, or was arraigned, or tried, or adjudged, and which particular offence he himself, in open Court, by his plea, confessed he had committed *voluntarily*.

Surely the exacting of this oath is a punishment ;—it effectually disenables all who have done any of the acts mentioned in the oath, though they have received and accepted a full pardon and amnesty for the offences ; it is not a mere temporary suspension from the practice, but a disbarment—a perpetual exclusion from the national Courts. The Act punishes the party in a manner in which he was not punishable when the act was committed, and in a manner not conformable to the fundamental law of the land. The requirement of this oath brings its retrospective clauses directly within the ruling in *Ross'* case : " Adding a new punishment," said the Court, " or increasing an old one for the same offence, would be *ex post facto*."

Applying the principles advanced in the case supposed to this of the petitioner, the same results will be obtained.

In these remarks, I have touched upon the first clause

only—giving but one example—but, on examination of the others, it will be found that the same peculiarities pervade them as are inherent in the first, and that like results flow from them.

It may not be wholly foreign to notice the fact that, if the party required to take the oath be a native citizen of the United States, every word of the retrospective part of the oath would affect every hour of his past life. 2 Kent, 258 note. 4 Bla. Com., 23; *Boyd v. Banta*, Coxe, 266; 1 Russ. on Crimes, 1 to 10; 1 Bishop on Crim. Law, sec. 460, 461, 3d Ed.

Recurring briefly to the cases of *Leigh*, and *Dorsey*, and *Cohen v. Wright*, it will be seen that in Leigh's case the law only required the attorney to swear that he had not transgressed the statute "since the passage thereof." Notwithstanding this oath may, perhaps, on strict construction, be deemed prospective, yet it was censured in strong language by a majority of the court.

In *Dorsey's* case, the oath to be taken was, not that the party had not violated the provisions of the statute since its enactment, but from a period prior thereto. As already observed, a majority of the court decided the retroactive portion of this oath to be unconstitutional and void.

In *Cohen v. Wright*, the court expressed some doubt as to the validity of the oath (quoted in full in the former part of this opinion) "so far as it was a declaration of past conduct." But, it remarked: "The Act is not retrospective as it merely requires the party to swear that he has not committed any treasonable act *since* its passage." And near the close of the opinion it was said: "The law warned him what the result would be, and although it may be severe, it is a consequence of his own voluntary violation of the fundamental rights of society."

To require a person, under any circumstances, to take an oath of innocence of crime, even when he had warning by a pre-ordained law—and warning, it is said, is the end of punishment—is a rigid exaction. Yet it was cautiously obser-

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ed by the court, in the case last cited, in speaking of the oath before it, that "it seemed to go beyond the strict letter of the constitutional oath. * * * It however, does but carry out the object, design and spirit of the constitutional oath; and as it is not an unreasonable requirement, being confined to acts since the passage of the law, and does not clearly violate the constitution, we are unwilling to declare it void on a mere doubt."

But the particular question now before this Court, is of still greater importance, because the oath of expurgation required by the Act of Congress, approved January 24, 1865, goes back and searches the conscience of the petitioner, who is a native citizen, born in 1791, during the whole course of his life—retroacting upon him for a period little less than three-quarters of a century anterior to its passage by Congress.

That the imposing of the retrospective portions of this oath is virtually compulsory, and effectually punitive, cannot, in my judgment, be denied. It makes the party swear to a life long innocence, and to testify against himself; and herein it is also an infraction of the fundamental law of the land.

And while preparing this opinion, I have not been unmindful of the magnitude, nay, awfulness of the responsibility which devolves upon a Court in pronouncing against even a part of a solemn Act of the Congress of the United States.

JUDGMENT.

Upon argument had on said motion of the petitioner, Mr. Law, and after full consideration of the matters of fact and of law involved, it is ordered and adjudged by the Court, that the Act of Congress, approved January twenty-fourth, eighteen hundred and sixty-five—so far as it was intended to apply to this case—is repugnant to the Constitution of the United States.

Motion granted.

Savannah, May 31st, 1866.

The State of Georgia vs. James Atkins, Collector, etc.

THE STATE OF GEORGIA, Comp't, vs JAMES ATKINS, Col., etc.
Def't.

1. A State may sue in a Circuit Court. Where a State is plaintiff the jurisdiction of the Supreme Court is not exclusive.
2. A Circuit Court, as a Court of Equity, may, by injunction, prevent a Revenue officer from collecting an assessment of tax not warranted by law.
3. The term "Corporation," as used in the Acts of Congress touching internal revenue, does not include a State; consequently, the income of the State of Georgia from the Western & Atlantic Railroad, property owned, controlled and managed by that State, has not been made, by law, a subject of taxation

In Equity. In the District Court for the Northern District.
Application for injunction. Decided by Judge ERSKINE,
1866.

ERSKINE, J.—This is a bill in chancery, filed in this Court by the State of Georgia, against James Atkins, the defendant, collector of the fourth collection district of this State, under the Internal Revenue laws of the United States, praying that a writ of injunction may be granted to restrain the defendant from further proceeding in the collection of the sum of six thousand and four dollars and fifty-six cents, claimed to be due to the United States, under the 103d section of said laws, by the Western and Atlantic Railroad, and which railroad, the bill alleges, is the property of the State of Georgia exclusively, and that the entire nett income of this railroad forms a part of the revenue of the State, and is applied to the support of its government; and that the Superintendent is the mere agent of the State, and has no authority over the road or its income which is not specifically given to him by the Act of the State. The following portion of the bill, showing its general scope and object, may be cited at length: "And your orator further complains, and says, heretofore, on the tenth day of May, eighteen hundred and sixty six, the said James Atkins, Collector of the Internal Revenue of the United States, as aforesaid, gave notice to Campbell Wallace, the Superintendent of said railroad, that he, the said Superintendent, should pay to him, the said Collector, the sum of

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six thousand and four dollars and fifty-six cents, (6,004 56,) the said sum being demanded as revenue tax of the United States on six hundred and forty-thousand one hundred and eighty-two dollars and forty-nine cents, gross earnings of said road for five months and two days, to the twenty-eighth day of February, eighteen hundred and sixty-six; and that should he, the said Superintendent, fail to make said payment by the twentieth day of May following, that he, the said Collector, would issue and have levied upon said railroad and its property, a distress warrant for said amount with ten per cent. added thereto."

The defendant demurred to the whole bill. This admits all the facts in the bill that are well pleaded.

The several questions which arose and were involved in the case were argued, by Messrs. Law and Jackson for the complainant, and by Mr. Fitch, United States District Attorney, on behalf of Mr. Atkins, the Collector.

From the view which I take of this suit, it will not be necessary to pass upon more than two of the questions discussed.

The first matter for inquiry is that of jurisdiction. The District Court of the United States for the Northern District of Georgia has—by the Act of Congress approved August 11th, 1848, 9 Statutes at Large, 280—annexed to it the powers of a Circuit Court. The Circuit Courts of the United States are courts of special and limited jurisdiction, deriving all their powers from the Constitution and the Acts of Congress.

I will briefly endeavor to ascertain whether this Court has jurisdiction of the parties.

In the case of *The State of Pennsylvania v. The Wheeling & Belmont Bridge Co.*, 13 How. 516, it was asserted in explicit language, by Mr. Justice McLEAN, who delivered the opinion of the Court, and also by Mr. Chief Justice TANEY, in his dissenting opinion, that the suit might have been instituted in the Circuit Court for the Western District of Pennsylvania, instead of originally presenting it to the

Supreme Court. And as to the controversy.—The first part of the second section of the Act of March 2d, 1833, provides, "That the jurisdiction of the Circuit Courts of the United States shall extend to ALL cases in law and equity, arising under the revenue laws of the United States, for which other provisions are not already made by law." It will be observed that the jurisdiction here conferred by Congress does not depend upon the amount in dispute, or upon the citizenship of the parties.

The case of *Cutting et. al. vs. Shook, Assessor, and Gilbert, Collector*, of the 32d collection district of the city of New York, was a suit in chancery, instituted by the complainants in the Circuit Court of the United States for the Southern District of New York, for themselves, as well as all others in interest, who might come in, etc., against the defendants, to enjoin the assessment and collection of a tax claimed by these officers to be due to the United States under the 99th section of the National Internal Revenue laws, for bonds, stocks, etc., bought and sold by complainants, as licensed brokers and bankers. Because, among other things, of the joinder of improper parties, the injunction was denied by the Court, and the parties left to their remedy at law. But Mr. Justice NELSON, in delivering the opinion, said: "The second section of the Act of Congress, of March 2, 1833, known as the *Force Act*, confers jurisdiction in express terms, and which has been applied to this Act by its fiftieth section. And jurisdiction had previously, and has since, been upheld and exercised upon general principles of equity jurisprudence. (9 Wh., 739, 903; 16 How., 369; 18 *ib.*, 331; 1 Black, 436.)" Pamph.—containing argument of *Mr. Courtney*, United States District Attorney, in behalf of the defendants, and the decision of Judge NELSON—p. 27, New York, 1865.

The preceding extract is a direct authority on the question under immediate consideration; and, for myself, I entertain no doubt whatever of the jurisdiction or power of this Court, if the tax sought to be collected is illegal—unwar-

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ranted by the Act of Congress—to interpose, by writ of injunction, and arrest the threatened invasion of the property of the complainant.

One other question only, need be the subject of examination, and that is, whether, under the Internal Revenue laws, it was the intention of Congress that a duty or tax should be collected out of property owned, controlled and managed solely by a State: for it is admitted in the pleadings that the Western & Atlantic Railroad is the property of the State of Georgia exclusively, and that the nett income arising from the road is revenue applied to the support of the government of the State. Section 103 of the Act of Congress of June 30, 1864, as amended by that of March 3, 1865, declares “that every person, firm, company, or corporation, owning or possessing, or having the care, or management of any railroad, canal, steamboat, ship,” etc., “engaged, or employed in the business of transporting passengers, or property for hire, or in transporting the mails of the United States, * * * * shall be subject to and pay a duty of two and one-half per centum upon the gross receipts of such railroad, canal, steamboat, ship,” etc. The question narrowed to a point is this: Does the word or term “corporation,” for the purposes of this Act, and as herein used, include the term “State?” The United States are formed of a number of States, or Commonwealths, united together, and these constitute one General Government. The State of Georgia is an integral and indissoluble part of the United States; but it is nevertheless, in the meaning of public law, a State. When the term “corporation” is applied to a Nation or a State, it is employed in its most extensive signification; and thus used, the United States, and the several States, or Commonwealths, composing the Union, may be termed “corporations.” But when the term “corporation” is directed or refers to those artificial persons—bodies corporate or politic—instituted for the promotion and advancement of religion, learning or commerce, and for various other objects—public or private—where charity, industry,

skill, and speculation, can be freely and advantageously employed, and which owe their existence, name, powers, and duration to a government, it is used in its ordinary, and—to the common understanding—explicit sense.

Is the former or the latter application of the term the fair and legitimate one intended by the Act?

Now, in order to arrive at the intention of the law-giver, the whole and every part of the statute should be considered in determining the meaning of any of its parts; taking the words to be understood in that sense in which they are generally used by those for whom the law was intended, and discarding all subtle and strained construction for the purpose of limiting or extending their operation or import. In the case of *Martin v. Hunter's Lessee*, 1 Wheat., 326, Mr. Justice SROXY, in delivering the opinion of the Court, said that "words are to be taken in their natural and obvious sense, and not in a sense unreasonably restricted or enlarged." And in *Dunn v. Reid*, 10 Peters, 524, it was remarked by Mr. Justice McLEAN, in pronouncing the decision of the Court, that "cases may be found where courts have construed a statute most liberally to effectuate the remedy, but where the language of the act is explicit, there is great danger in departing from the words used, to give an effect to the law which may be supposed to have been designed by the Legislature." I am of the opinion that Congress intended the term "corporation," as used in this Act, to be understood in its general, obvious and natural meaning; and, therefore, it does not include the term "State." And, so far as my limited researches go, I am unable to discover a single case in the Supreme Court, or in any of the Circuit or District Courts of the United States, wherein it has been decided that the term "corporation"—body corporate or politic—when used in a statute, includes a "State," or where the one term is used as a synonym for the other.

It is therefore ordered that the demurrer be overruled; and that the writ of injunction issue in accordance with the prayer of the complainant, upon giving bond in the sum of thirty thousand dollars.

Ann V. Martin vs. The Bartow Iron Works.

ANN V. MARTIN, a citizen of Mississippi, vs. THE BARTOW
IRON WORKS.

- [1.] Conciseness in pleading recommended: verboseness, as well as curious and refined subtleties, condemned.
Brief form given for a general demurrer.
The office of a general, and also that of a special demurrer, stated.
Certainty and particularity requisite in a special demurrer.
- [2.] Duplicity vitiates a plea; but, at Common Law, this defect can be taken advantage of by special demurrer only, which must point out, specifically, wherein the duplicity consists.
- [3.] It seems to be the settled law of Georgia that, to an action on what is commonly known as a sealed note, or single bill, the defendant may plead either a total or (by Statute) a partial failure of consideration; and this rule of the local law will be applied in the United States Courts sitting in Georgia, and acting upon an instrument made and to be performed in that State.
- [4.] A total failure of consideration is not set out by a plea which alleges merely that the note sued upon was given for the hire of negro men claimed by the plaintiff, at the time of the hiring, as slaves; whereas, at that time they were, in fact, free, having been so declared by the laws of the United States and the Proclamations of the President. These facts are not sufficient to make a failure of consideration, because, even admitting the negroes to have been free, they may first have hired themselves to the plaintiff, and, by their consent, she may have transferred their labor to the defendant; or the plaintiff may have acted as their agent in making the contract of hiring with the defendant, and may have taken the note payable to herself in trust for them.
- [5.] It was no violation of the laws of the United States, or of the President's Proclamations, for the plaintiff to hire negro men to the defendant in Georgia in January, 1864.
- [6.] Certainty to a common intent suffices in a plea in bar; and if formal faults exist, they must be pointed out by special demurrer.
- [7.] Where several pleas in bar are pleaded, each must stand upon its own merits, and the construction of one will not be aided by reference to another.
- [8.] No action can be maintained on a contract, the consideration of which is either wicked in itself or prohibited by law.
- [9.] A stipulation in a contract for the hire of negroes, that the hirer was to remove them and keep them removed from territory within the lines of the Federal army, with the design of preventing their liberation from their former state of servitude, was in contravention of the settled policy of the United States in January, 1864; and this stipulation so violated the contract that no recovery for hire could be had upon it.
- [10.] A judgment for money cannot be rendered in this Court on a contract payable, by agreement of the parties, in "Confederate Treasury notes."
- [11.] If a demurrer to a plea in bar of the whole cause of action be overruled, the proper judgment is *NU CAPAT*; or, if the plea go to a part only of the cause of action, and demurrer to it be overruled, the like judgment, as to such part, must be rendered.

Demurrer to Pleas. In the District Court of the Northern District. Decided by Judge ERSKINE. September Term, 1867.

ERSKINE, J. This is an action of debt brought by the plaintiff against the defendant on a sealed instrument, of which the following is a copy:

"\$3,000. On or before the 25th day of December next, I promise to pay Ann V. Martin, or order, three thousand dollars, for value received, as witness my hand and seal.

Allatoona, January 6th, 1864.

[Signed]

T. J. HIGHTOWER, [L. S.]

Supt. Bartow Iron Works."

To this action defendant pleaded nine pleas. The first was withdrawn. Replications were filed to the fifth and sixth, and issue joined. Special demurrers—several of which contained substantial objections also—were put in to the second, third, fourth, seventh, eighth and ninth pleas.

Defendant, in his second plea, alleges a total failure of consideration, and sets up affirmatively that the promise was made to the plaintiff in consideration of the hire of twenty negro men to work for defendant at the Iron Works in Bartow county, Georgia, for the year 1864, and that it was agreed, as a part of the contract of hiring, that if the Federal army approached near said county, defendant was to remove these hired men and their families, at the expense of plaintiff, and that no hire should be paid for the time lost by reason of said removal. Defendant then avers that the contingency thus provided for happened, and that he removed them to Macon, Georgia, and that there they were taken possession of by the authorities of the so-called Confederate States, and that he received no hire nor other benefit from their services.

The third plea alleges a partial failure of consideration; but it is in all other respects substantially like the preceding one.

The demurrer to the second plea presents the following objections: That the plea is double in this, that it contains several distinct matters of defence, and that plaintiff cannot take or offer any certain issue upon said plea. Also, that defendant attempts to set up and plead a failure of consideration, and that the matters therein contained, in manner and form as therein pleaded, are not sufficient in law to show a failure of consideration, and that plaintiff is not, by law,

bound to answer the same. Then follows the usual, but (I apprehend) useless formula, that the plea is inartificially pleaded, and is in other respects uncertain.

The objections taken in the demurrer to the third plea are in language similar, and are stated substantially in like manner as those to the second plea.

Before giving the opinion of the Court on the legal sufficiency or insufficiency of the pleadings in this case, I trust I may not be deemed obtrusive by the bar if I state, briefly, that the long and verbose manner in which pleadings are frequently drawn is unnecessarily laborious to the draftsman and fatiguing to the reader. Take, for example, the precedent for a general demurrer, as printed in the earlier editions of Chitty, and in other works on pleading, and it will be found attenuated to some dozen or fifteen lines, whereas, it would be as sufficient by the rules of good pleading, as understood by the fathers of the law, and equally as intelligible, if set forth in two or three. A general demurrer in the following form would, I apprehend, be sufficient in the case under consideration :

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And the plaintiff, by her attorneys, Hammond, Mynatt and Welborn, says that the second, third, fourth, seventh, eighth and ninth pleas are not sufficient in law.

Vide Stephens on Pleading, 44—8th American edition.

And I will here take occasion to repeat, concisely, what I said more at large in the case of *Scott, Zerago & Co. vs The Planters' and Mechanics' Bank*, that, while I have the honor to preside in this Court, I will discourage, nay, discountenance, all the delicately cunning and curious devices that have crept into the science of pleading.

The law, says Lord Coke, "speaketh by good pleading," and the day has arrived when this wise axiom of that great master of the common law is to be interpreted liberally. This is an age of progress and utilitarianism in law as in

other sciences, and it is therefore high time that the subtleties, verbosities and useless disputations of the ancient pleader give way to common sense and common reason.

A general demurrer enables the party to assail every substantial imperfection in the pleadings of the opposite side without particularizing any of them in his demurrer; but if he thinks proper to point out the faults, this does not vitiate it.

A special demurrer goes to the structure merely, and not to the substance, and it must distinctly and particularly specify wherein the defect lies; and, indeed, the statutes 27, Eliz., and 4 and 5 Anne, as it is said, oblige the party demurring to lay, as it were, his finger on the very point, otherwise the demurrer may not be noticed. Salk. 219—Wils. 219—*Snyder v. Cray*, 4 Johns, R. 428.

When a party demurs specially, he may, in argument, attack substantial errors.

The first point made in the demurrer to the second plea is, that it "is double, in this, that it contains several distinct matters of defence; and, also, that said plaintiff cannot take or offer any certain issue upon said second plea." It is an ancient and well settled rule that, if a pleading be double, it is bad on special demurrer; but the imperfection must, as we have seen, be pointed out in the demurrer. It is not sufficient to say that the plea is double, or that it contains two or several distinct matters, but the pleader must specially show wherein the duplicity consists; (1 Tidd. Pr. 694) for, by pointing out the fault, the adverse party may amend, if he choose, or demand the judgment of the Court on its sufficiency.

The objection for doubleness taken to the second plea has, and in like manner, been also taken to the third. This making the law equally applicable to the one as to the other, both may be passed upon together. Has the plaintiff, in this part or division of the demurrers to these pleas, or to either of them, come within the letter or spirit of the rule laid down? I think not. No duplicity—if there be any in

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one or both of these pleas—has been pointed out in the demurrer or disclosed in the argument.

Another objection—and it goes to the substance—is taken to the second and third pleas, namely: that defendant has attempted to set up in the second a total failure of consideration, and in the third a partial failure. And Mr. Mynatt, in his argument, contended that neither of these defences could be pleaded to a specialty. Such, doubtless, is the rule of the common law, as generally understood in England; but with us it has, in several of the States, been changed, or modified, by statutes; while in others, learned Courts have, in a greater or less degree, relaxed this rigid rule, that substantial justice may be done speedily and with as little technical litigation as possible, and without circuity of action.

Whether the writing sued on in this action has all the attributes of the specialty of the common law, is not a question directly before the Court for determination. The writing was executed in Georgia, and the contract was to be performed here; and the instrument being of a peculiar character, and not strictly speaking commercial paper, governed by the law merchant—though the promise is absolute, payable to order, and the sum certain—it ought to be given effect to and adjudged agreeably to the local law, and the construction given to such instruments by the local tribunals. *Swift v. Tyson* 16, Peters 1.

The distinction between specialties and simple contracts should be carefully preserved by the Courts when the dignity of those contracts has not been interfered with by legislative enactments; for, in the payment of debts of deceased persons, and in other cases, the common law makes a distinction; but by the 25th section of Act of 1799, Cobb's Digest 1135, promissory notes and other liquidated demands are made of equal dignity with bonds and other specialties. The Act of December 26, 1836, *Id.* 490, enables defendants to give in evidence a partial failure of consideration upon any contract, provided that it be pleaded only in such cases

and under such circumstances, and between such parties as would now allow and admit the plea of total failure of consideration.

Albertson et. al. vs. Holloway for use, etc., 16 Ga., 377, was a suit on an instrument, in nearly every respect, like this. The defendant pleaded, among other defences, a partial failure of consideration. Plaintiff objected on the ground that no fraud or illegality was alleged in the contract, the same being under *seal*. The Court below sustained the objection. A writ of error was taken, and the case, went to the Supreme Court of the State, and it reversed the judgment. The opinion of the Court was delivered by STARNES, J., who, after commenting on the anomalous status of the instrument, used the following language: "Yet," said the Judge, "we know that the rule we have been considering, has not been applied to ordinary promissory notes, but that it has been the immemorial practice in our State to allow pleas of total failure of consideration (and of partial failure since the Act of 1836) to suits on such notes."

From this it would seem to be the settled law of this State, that total as well as partial failure of consideration affords a good defence to writings, which are commonly known as sealed notes or single bills. And I can see no sound reason why matters which destroy the demand, as well as those which go to diminish it, may not be pleaded in defence of this action.

Withers vs. Green, 9 How. Action of debt on a single bill. This cause was brought by writ of error from the Circuit Court of the United States for the Southern District of Alabama, to the Supreme Court. The law of that State places bonds, or any writing under seal, on the footing of promissory notes, and allows defendants, by special plea, to impeach, or go into the consideration of such in the same manner as if the writing had not been sealed. The opinion of the Supreme Court was pronounced by Mr. Justice DANIELL, who, after reviewing the English and American

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showing a relaxation of the old rule, and allowing the defendant to obtain justice in this way instead of driving him to a cross action, said: "But, however, the rule laid down by the Courts of England, should be understood, it has repeatedly been decided by learned and able judges in our country, when acting, too, not in virtue of a statutory license or provision, but upon the principles of justice and convenience, and with a view of preventing litigation and expense, that when fraud has occurred in obtaining, or in the performance of contracts, or when there has been a failure of consideration, total or partial, or a breach of warranty, fraudulent or otherwise, all or any of these facts may be relied on in defence by a party when sued upon contracts, and that he shall not be driven to assert them, either for protection or as a ground of compensation, in a cross action." The doctrine here enunciated was approved in *Van Buren v. Diggs*, 11, How. 461; and again in *Winder v. Caldwell*, 14, *Id.* 434.

The demurrers to the second and third pleas are overruled.

The fourth plea states that the consideration for the promise has entirely failed, in this, that the note was given for the hire of twenty negro men, claimed by the plaintiff at the time of the said hiring as slaves, but were in fact free, having been so declared by the laws of the United States, and proclamations of the President thereof, before the time of said hiring.

Plaintiff in the demurrer to this plea says, that the matter and things therein contained, in manner and form as set forth, do not amount in law to a failure of consideration. Also, that the plea consists altogether of matter of law upon which no apt or material issue can be taken; and that the plea is argumentative, uncertain and insufficient. The remainder of the demurrer goes to other matters of form generally.

The facts set forth in this plea do not constitute a failure of consideration. Admit that the plaintiff did claim these men as slaves—notwithstanding they may have been free—

this would not affect the contract; for they may have first hired themselves to plaintiff, and by their consent, express or implied, she may have transferred their labor to defendant, or plaintiff may have acted as their agent in hiring them to defendant, and may have taken the notes payable to herself in trust for them. Besides, there is no averment whatever that the contract was not fulfilled on the part of the plaintiff.

The demurrer to the fourth plea must be sustained.

The seventh plea says that the consideration for the promise is illegal, for that it was made for the hire of negroes at Bartow county, Georgia, in January, 1864, and that the contract was in violation of both the letter and spirit of the laws of the United States, and the proclamations of the President thereof.

Plaintiff's demurrer alleges that the matters above contained do not support the plea of illegal consideration. The remainder of the demurrer is addressed to the structure of the plea.

The demurrer is well taken to the substance of this plea. The hiring of these men by the plaintiff to the defendant, in the State of Georgia, in 1864, was not in violation of any law of the United States, or any proclamation of the President. And indeed the President, in the emancipation proclamation, dated January the first, A. D. 1863, recommends to the freedmen, "that in all cases, when allowed, they labor faithfully for reasonable wages," (12 vol. U. S. 1268.) I perceive no legal distinction in the plaintiff's hiring these men to defendant, and the men hiring themselves to defendant. No averment is made that they did not consent to be so hired, nor that the contract is unperformed on the part of the plaintiff.

The eighth plea alleges that the consideration for the promise was illegal—being contrary to the public policy of the government of the United States; that it was made for the hire of negroes as slaves, and defendant avers that it was a part of the consideration of the contract, that the defend-

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ant was to remove said negroes, and keep them removed from territory within the lines of the Federal army, with a view and design of preventing their liberation from their former state of servitude, and that, previously to the time of the making of said contract, the Government had determined upon, adopted and established the policy of liberating said negroes from their former state of servitude.

Demurrer to this plea—and the causes alleged in it—are, that the plea contains no sufficient allegation of illegal consideration; and that no matter of fact has been alleged or shown in bar of the action, but that it consists altogether of matters of law, and that it is argumentative, evasive, double, etc.

Such is substantially the language of the eighth plea and of the demurrer to it.

Ex-Gov. Joseph E. Brown, who argued for defendant, cited and commented on the following authorities: 16 How. 336; 3 Cranch, 242; 2 Wall. 45; 11 Wheat. 288; 1 Story Eq. 293, a. b.; 3 Kelly, 181; 4 Peters, 188; 12 How. 63; 2 Black. 585; Dana's Wheaton, 305, note; Addison on Contracts, 93-96; Chitty on Contracts, 586; and Smith's L. C. 423.

Mr. Pope. in his brief, referred to Stephen on Pleading, 256, 424, and 260; 12 Peters, 84, 5 *Id.* 397; Gould Pl. 421.

Counsel for plaintiff presented the following authorities in support of the demurrer: Stephen on Pleading, 348, 384, 387; Chitty on Contracts, 570, 575; 2 Kent, 10th ed. 636, note.

The Court will direct its attention to the first point taken in the demurrer.

The plea is, perhaps, too general in its structure, and otherwise deficient in form, if tested by the rules of pleading; but if the formal faults be not specially pointed out, it must be adjudged certain to a common intent, this being all that is required in a plea in bar.

In resolving this plea, the Court must look to its language alone for the meaning of defendant, and none of the other pleas pleaded, nor any part of them, can be invoked to aid

in the interpretation and construction of this, or in explaining the import of any word or phrase used in it. Each plea must stand on its own merits. If this contract when entered into was in violation of the policy of the government, it is vicious and invalid and can find no favor in the Courts. Mr. Chief Justice MARSHALL, in *Armstrong vs. Toler*, 11 Wheat, 258, said: "No principle is better settled than that no action can be maintained on a contract the consideration of which is either wicked in itself or prohibited by law." And in *Tool Company vs Norris*, 2 Wall., 45, Mr. Justice FIELD, in speaking of contracts void, as against public policy, said: "The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the Courts of the country."

The gist of the agreement of the parties as stated in the plea—and this statement as pleaded is admitted by the demurrer, is "that defendant was to remove said negroes away, and to keep them removed from the territory that was within the lines of the Federal army, with a view and design of preventing the liberation of said negroes from their *former* state of servitude." It needs no argument to show that this agreement was in contravention of the previously settled policy of the Government, and wicked in itself.

Demurrer not sustained.

The ninth and last plea is as follows: that the promise aforesaid was illegal and void in this, that it was the express understanding and agreement at the time said promise was given, that the payment of the amount so promised should be made in what was denominated Confederate Treasury notes, which currency defendant says was prohibited by law to circulate. Verification.

The demurrer states that the plea is double, containing several and distinct matters of defence, and that no certain issue can be taken thereon, and that the matters and things contained in the plea as therein set forth, are insufficient in law to show illegality of consideration, etc.

In my opinion it is not necessary to decide whether the

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promise is illegal or whether Confederate Treasury notes were prohibited by law to circulate, for it is alleged that plaintiff agreed to receive these notes for the amount promised. This being so, plaintiff cannot come into this Court and ask a judgment for *money*. *Clearwater v. Meredith*, 1 Wall. 25.

Demurrer overruled.

JUDGMENT.

Nil capiat on the second, eighth and ninth pleas ; and so far as the defense goes set up in the third plea, there must be judgment of *Nil capiat*.

HAMMOND, MYNATT, and WELLBORN, for plaintiff.

BROWN & POPE, for defendant.

BAILY, Trustee, vs. MILNER.

[1.] Bills of credit, as defined by the Supreme Court, are paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money.

"Confederate Treasury Notes" were not issued by the sovereign power of any State or combination of States ; nor did they pledge the faith of any such State or States ; consequently, they were not bills of credit, within the prohibitory terms of the Constitution. In the seceded States (so-called) the sovereign authority was, for the time, displaced ; the constitutional governments were overthrown, and their functions usurped by spurious and revolutionary governments. These usurping governments could not, by legislation or otherwise, bind the public faith for the redemption of the notes in question.

[2.] But though said notes were not bills of credit, they were, nevertheless, illegal ; and a promissory note given for them, by the borrower to the lender, is void, and does not constitute a debt provable in Bankruptcy against the estate of the borrower.

[8.] In respect to illegal contracts, the following is the rule generally observed by Courts of Justice : With an *executed* contract, they will not interfere, but leave the execution to stand ; if the contract be *executory*, they will lend no aid to either party to enforce it.

In Bankruptcy. In the Northern District.

Decision by Judge ERSKINE, on matter certified for his opinion. February, 1868.

ERSKINE, J.—In 1863, John Neal loaned twenty-five hundred dollars, in "Confederate Treasury Notes," to Milner, the Bankrupt, for which amount he made his promissory note to Neal. Subsequently, Neal, in making a disposition of some of his property among his children and grand children, gave this note to his son-in-law, Samuel Bailey, in trust for minor children of Susan Beall, a daughter of Neal.

Bailey, as trustee, sought to prove this claim against the estate of the Bankrupt. Counsel for the latter objected: *First*, because the consideration for the contract was Confederate Treasury notes; *Secondly*, because these notes were borrowed for the purpose of hiring a substitute to serve in the Confederate army, with the knowledge of Neal; and that the notes were so appropriated, and the substitute hired therewith did go into the said army.

Evidence being heard on these points, the Register rejected the claim, and the proceedings were certified to the Judge. The conclusion at which the Register arrived was approved.

The party whose claim was thus rejected, petitioned the Judge for a re-hearing, on the ground that the testimony adduced—in proof of the second objection in particular—was wholly insufficient to warrant the decision of the Register, or affirmance by the Court. A new hearing was granted before the Register. The testimony on both sides is long and contradictory, with the exception that all agree that the loan was made in Confederate Treasury notes.

The Register adhered to the course of reasoning previously entertained by him, and gave the same judgment as before. Mr. Bailey being still dissatisfied with the ruling, the matter was again certified for review.

From the views which I entertain of the legal principles involved in this proceeding, it is not essential to an approval

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or disapproval of the conclusion at which the Register arrived, that these Confederate Treasury notes, or any portion of them, were used to procure a substitute to serve in the Confederate army, or that they were employed for any other purpose. The Register holds, as he held at first, that the contract was illegal and void ; and this result I approve and affirm. But I do not concur with him in one of the principal reasons advanced for his decision ; and which reason is more prominently argued in his first written opinion than in his last, namely, that these notes are bills of credit within the sense of that term, as understood in the Constitution.

“ No State shall enter into any treaty, alliance, or confederation ; grant letters of marque and reprisal ; coin money ; emit bills of credit,” etc. Const. U. S., Art. 1, sec. x, p. 1.

No disquisition on the origin of bills of credit, or history of their rise and progress, or of their fall, under the inhibition just cited, would aid in the determination of this case. Therefore, I will but remark that the great minds that framed the Constitution were, from recent experience, aware of the blighting effect on the domestic and foreign commerce of the States, and on the welfare of the whole country—which flowed from the almost indiscriminate issuing of these bills by the colonies, and afterwards by the States, as money among the people—to suffer its perpetuation, or to longer tolerate it to the States ; and time has proven the wisdom of their statesmanship.

So far as I have been able to ascertain, all paper answering to bills of credit put forth during the War of Independence were promises to pay. But, be this so or not, the Supreme Court of the United States, in *Craig et. al., v. The State of Missouri*, (4 Peters, 410,) held that a paper currency emitted by a State, and receivable in discharge of all debts and taxes due the State, and of all salaries and fees of office, etc., etc.,—and pledging the faith and funds of the State for the redemption of these paper issues—was within the Constitutional prohibition.

The same Court, in *Briscoe v. The Bank of the Common-*

wealth of Kentucky, 11 Peters, 258, gave the following comprehensive definition of a bill of credit: "The definition, then, which does include *all* classes of bills of credit emitted by the colonies, or States, is a paper issued by the sovereign power, containing a pledge of its faith, and designed to circulate as money."

Taking this definition, as imparted by the highest judicial tribunal in the land, as a guide, it will conduct to a correct conclusion of the endeavor to ascertain whether these treasury notes, or bills, issued by the so-called Confederate States, fall within it.

Although it is declared that no State shall emit bills of credit, yet, if two or more of the States ally themselves, or confederate together, and on their faith and credit issue these bills, I apprehend the inhibition would apply with a force equally as direct and controlling against the allied or confederated States as against a single one.

Here is a copy of one of these Treasury notes:

"Fundable in eight per cent. stock or bonds of the Confederate States. Six months after a ratification of a treaty of peace between the Confederate States and the United States, the Confederate States of America will pay five dollars to bearer. Richmond, September 2, 1861.

Receivable in payment of all dues, except duties."

Then follow the names of a Register and Treasurer.

One decision—and only one—on this subject has been brought to my notice; that is the case of *Bank of Tennessee v. Union Bank of Louisiana*, lately tried before Judge DUBELL, and a jury, in the Circuit Court of the United States for the Eastern District of Louisiana, and published in the *American Law Review* for January, 1868.

The Judge is there reported to have said, in his charge to the jury, "That Confederate Treasury notes issued by said Government, and circulated as money, were bills of credit within the meaning of the Constitution; and, therefore, an unlawful issue." The views which present themselves to my

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mind do not terminate in accord with the opinion expressed by the learned Judge.

During the latter part of the year 1860, and in the early part of 1861, South Carolina, Georgia, Louisiana, Virginia, and other States, by similar modes, called on the people to send delegates to meet in Convention. Accordingly, these Conventions assembled, and each passed an ordinance of secession, as it is generally termed, by which ceremony, these Conventions severally adventured to withdraw the States from the Federal Union, and to release the people from their subjection to the laws of the land, and their allegiance to the nation. The Constitutional State governments were overthrown, and superseded by spurious and revolutionary governments. The setting up of a pretended Central or General Government, styled, "The Confederate States of America," followed; and, soon thereafter, open rebellion and war of portentous magnitude burst upon the nation. *The Prize Cases*, 2 Black 635, *Shortridge v. Mason*, United States Circuit Court, District of North Carolina. Opinion of the Court delivered by Chief Justice CHASE. 2 Am. Law Review 95.

In the seceded States, (so-called) the sovereign authority being, for the time, displaced, consequently there ceased to be, within any of them, a government under the Constitution of the United States. Then, can it be said that the usurping power could pledge the faith of the State by a public law, or otherwise, for the payment of the notes or bills issued by the so-called Confederate States of America? Or could this pretended central government bind any of those States for the redemption of these notes?

But these Confederate Treasury notes or bills do not pretend to have been emitted by a State, or a combination of States of the Union; nor can it be inferred from indicia found upon them—nor can their recondite history show—that they emanated from the sovereign power, and on the faith of any of the States. And thus it will be seen, that they did not possess the characteristic attributes of bills of

credit, in accordance with the definition of the Supreme Court of the United States;—they did not issue by virtue of the sovereignty of the State, nor did they rest for their currency on the faith of the State pledged by a public law. *Darrington et. al. v. State Bank of Alabama.* 13 How. 12.

Notwithstanding these notes or bills were not, in my judgment, bills of credit within the prohibition contained in the tenth section of the first article of the Constitution, yet they were none the less illegal; they were issued by a pretended government, organized in the name of certain States, by subjects and citizens of the United States, and who, at the very time, were in rebellion against their rightful government, and whose design and object was to “dismember and destroy it.” *The Prize Cases—Shortridge v. Mason, supra.*

It may not be wholly unimportant to remark that it is a well established doctrine of the Courts that a wide distinction exists between an *executed* and an *executory* contract. In the former case, Courts of justice will not, as a general rule, interfere between the parties, to set the contract aside, but will leave them where they placed themselves; and this, too, notwithstanding the contract be, in part only, founded on an illegal consideration.

Nevertheless, any person owning property may, if no fraud be put upon him, and no misrepresentation, or circumvention or covin enter into the transaction, alienate it conditionally or absolutely, for what currency or thing he chooses, or even given it away. But an executory contract, like this claim of Bailey, the trustee, nevertheless, will not be enforced. The principles of law directly applicable to executory contracts, based upon illegality, were long since determined by the Courts, both in England and in this country. One case only will be referred to. The doctrine on this subject, as laid down by Mr. Justice WASHINGTON, in *Toler v. Armstrong*, 4 Wash., 296, is so succinctly announced that it is best it be given in his own words: “I understand the rule, as now already settled, to be that, where the contract grows *immediately* out of, and is connected with an

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illegal or immoral act, a Court of Justice will not lend its aid to enforce it. And if the contract be, in part only, connected with the illegal transaction, and growing immediately out of it, though it be, in fact, a new contract, it is equally tainted by it."

If this demand of twenty-five hundred dollars were allowed, the dividends of the creditors, arising from the assets would, of course, be diminished that amount; and this without any fault on their part, but wholly through the illegal dealings of the bankrupt and Neal. *Bankrupt Law, section 22.*

I may add that the law, in allowing a guilty party to take advantage of the illegality of his own act—as is here done by the bankrupt—does so, not with a view of conferring a benefit on him, but upon grounds of public policy, and also in this case, that injustice may not be done to the creditors of the bankrupt.

The decision of the Register is approved. The Clerk will certify this opinion to Mr. Register Murray.

February 18, 1868.

IN THE MATTER of the Oath to be taken by Jurors in the Federal Courts, under the Act of June 17th, 1862.

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[1.] Although the oath prescribed by the second Section of the Act of June 17th, 1862, will not, except at the instance of the Attorney representing the Government, be administered to jurors in the Federal Courts, yet, by the first Section of said Act substantially the same matters specified in the oath are made cause of challenge; and it is the right of any party to a case, civil or criminal, to challenge for such cause the jurors about to take action on such case. It does not follow, because the Government Attorney only can call for the oath to be administered, that he alone can urge the disqualifying conditions laid down by the first Section of the Act.

- [2.] If, under said Act, and by a party other than the Government, jurors be challenged, the challenge may be disposed of by allowing those who deem themselves disqualified under the first Section of the Act, to retire from the panel, without any sworn evidence of their incompetency.
- [3.] Grand jurors may, for cause, be challenged by any person to be affected by their finding. The right is not restricted to such persons as are in prison or under bail upon charges of crime; it may be exercised by one who, though still at large, has been warned by the prosecuting Attorney of the Court that he will be made, during the Term, the subject of an indictment for perjury.
- [4.] Where there is reasonable excuse for the delay, challenges to members of the grand jury will be heard after the body has been fully organized.
- [5.] The accused party has no right to submit evidence in his behalf to the grand jury; not even with the consent of the prosecuting Attorney. The grand jury are to examine the foundation on which a charge is made by the Government; not that on which it is denied by the alleged offender.

Indictment before the Grand Jury.

In the District Court for the Southern District. November Term, 1867.

Special Charge of the Court to the Grand Jury.

ERSKINE, J.—*Mr. Foreman and Gentlemen of the Grand Jury*: On the first day of the present Term, (November 7th) you were empannelled and sworn for this Judicial District,—your foreman and each of you then taking the ancient common law oath of grand jurors, and the Court, at the same time, delivering to you its general charge.

The Court feels that it is due to you, as well as to the District Attorney and the counsel for the challenger, Foster Blodgett, that such remarks as may be deemed proper to be made, and such decision as may be pronounced, be addressed to you, rather than to the learned counsel themselves; because the matters in controversy concern, and are directly against the legal *status* of several members of your body.

Blodgett comes here before the Court and demands the right to challenge the polls; and for this he relies on the first section of the Act of Congress of June 17, 1862, which statute is entitled "An Act defining additional causes of challenge, and prescribing an additional oath for grand and petit jurors in the United States Courts." The first section declares that, "In addition to the existing causes of disqualification and challenge of grand and petit jurors in the Courts

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of the United States, the following are hereby declared and established, namely: Without duress and coercion to have taken up arms or to have joined any insurrection and rebellion against the United States; to have adhered to any rebellion, giving it aid and comfort; to have given, directly or indirectly, any assistance in money, arms, horses, clothes or anything whatever, to or for the use or benefit of any person or persons, whom the person giving such assistance knew to have joined, or to be about to join, any insurrection or rebellion, or to have resisted, or to be about to resist with force of arms, the execution of the laws of the United States, or who he had good ground to believe had joined or was about to join, any insurrection or rebellion, or had resisted, or was about to resist, with force of arms, the execution of the laws of the United States; and to have counselled and advised any person or persons to join any insurrection and rebellion, or to resist with force of arms the laws of the United States." 12 Stats. 430.

The oath embodied in the second section—and which substantially follows the language of the disqualifying causes enumerated in the first—will be read to you, not that you may take or decline it, for it can be presented under the second section only, and at the suggestion of the prosecuting officer of the Government, but upon hearing it read, you will be better able to conclude whether you are, or are not, vulnerable to any one or more of the disqualifications mentioned in the first section. If you find that you are, you may retire from the panel. And, in my judgment, the defect, in a case of challenge for cause like this, may, in this manner, be shown. *United States v. Cornell*, 3 Mason, 91. *The State of Alabama v. Marshall*, 8 Ala., 302.

The following is laid down in a late accurate work on Criminal Procedure:

"The most natural method is to require the witness to declare the matter under oath, on the *voir dire*. But witnesses are not generally required to answer questions which will tend to their disgrace; therefore, in England, the inquiry

whether the juror has delivered an opinion adverse to the prisoner cannot be put to the juror himself, but it must be shown by other evidence. This point has been held the same way in some of our States. But generally in this country this class of questions is allowed to be put by the parties directly to the jurors; and in some of our States this doctrine is also aided by express statutes. When this is not done, and even when it is, the Court will sometimes, in aid of the general object, and without prejudice to other methods, call upon the jurors, collectively or singly, *to declare if they know any impediment to their serving, or if they are obnoxious to a particular objection which may have been suggested.*" 1 BISHOP *Law of Criminal Procedure*, sec. 795. And see sec. 768, *Id.* *Cook's case*, 13 Howell St. Tr., 311, 337. *Respublica v. Dennie*, 4 Yeates, 267. *McCarty v. The State*, 26 Missis. 299.

See concluding sentence in Sec. 2, Act June 17th, 1862—12 Stats. 430.

The challenger states in his affidavit, that the District Attorney distinctly promised him that he should be permitted on the trial before the grand jury to have the evidence in his defence laid before them.

No such promise or agreement can have the sanction of this Court. To allow evidence—either oral or written—to go before the grand inquest, on behalf of a defendant would be subversive of the ancient and well settled rules of Courts of Justice. MCKEAN, C. J., in *Respublica v. Shaffer* 1 Dall. 236, said: "It is a matter well known, and well understood, that by the laws of our country, every question which affects a man's life, reputation, or property must be tried by *twelve* of his peers; and that their *unanimous* verdict is, alone, competent to determine the fact in issue. If, then, you undertake to inquire, not only upon what foundation the charge is made, but, likewise, upon what foundation it is denied, you will, in effect, usurp the jurisdiction of the petit jury, you will supercede the legal authority of the Court in judging of the competency and admissibility of

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witnesses, and having thus undertaken to try the question, that question may be determined by a bare majority, or by a much greater number of your body, than the twelve peers prescribed by the law of the land."

Foster Blodgett does not ask to challenge the entire panel, but he avers that there are individual disqualifications attaching to particular jurors, because of their being within one or more of the clauses of the first section of the statute. In his petition, of file in this Court, and which is before you, he states, among other matters, in substance, that he is informed and believes, that a charge for perjury is now pending before you, but, that as yet, no presentment has been made, nor indictment found and returned into Court; that most of you are, under this statute, incompetent to inquire into his case; that he does not believe he can have a fair and impartial investigation of his case before you, or receive justice at your hands. He sets forth the names of the persons to whom he objects, and interposes a challenge to each.

It was contended by the District Attorney that, under this statute, it is only the Government that possesses the right to challenge. This Court, at the last Term, in the case of the *United States v. Cohen*, which was an action of debt on bond, ruled that under the first section, the defendant, as well as the United States, was free to challenge the polls. And such is still the opinion of the Court; nor can I perceive any difference in this respect between a grand and petit juror—between a civil suit and a criminal prosecution.

It is the general, if indeed it is not the universal doctrine of the common law, as administered in the Courts of our country, that when a person is charged with crime, and his case is to come before a particular grand jury, he may be present at its organization, and present challenges either to the array or to the polls; but if he be not held, by process, to answer to an indictment, he is not thus entitled. If Mr. Blodgett does not come within the spirit of this rule, (for he does not within the letter of it,) his motion to challenge must be denied.

In addition to the written petition of the challenger, he has also filed in Court an affidavit, which has been read to you without objection on the part of the District Attorney. A synopsis of so much of this affidavit, as is necessary for the Court to pass upon, will be stated. Blodgett swears that the District Attorney, Henry S. Fitch, Esq., in the city of Atlanta, during the last session of the United States Court there, informed deponent that he (the District Attorney) "expected to prosecute deponent before the grand jury of this Court, at this Term, for the offence of perjury." Deponent says that he laid before the District Attorney, by the hands of a friend, documents and papers which deponent expected to use in his defence, and informed him that he had witnesses by whom he could prove his innocence. He further says, that the District Attorney distinctly promised deponent that he should be permitted on the trial before the grand jury, to have his evidence in his defence laid before them. Further he states, that he was in attendance on this Court on Thursday, (7th instant,) but being informed that the District Attorney was then in *New York*, sick, and that it was not probable that any action could be had on his case during the Term, under advice of his counsel he returned home, with the promise of his counsel that he would telegraph him if the District Attorney arrived and he was needed. Receiving a telegram on Wednesday last, (13th instant,) he came down with his witnesses on the succeeding morning, and informed the District Attorney (who had just arrived) that he was ready with his witnesses, when the District Attorney replied, "Your case is now before the grand jury, and I will see what can be done with it." Deponent adds that, "He was afterwards informed by his counsel that the grand jury refused to hear his evidence."

And here the prime question presents itself, and it must be answered. Has Foster Blodgett now the right to challenge any individual member of the grand panel? True, he was not arrested and imprisoned on any criminal charge and now brought hither by order of the Court; nor is he under bail,

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or recognizance; but because he is not in any of these constrained positions, is he any the less entitled to a grand jury of his country, legally qualified under its laws? Surely not.

At the time of the empanneling of this grand jury, the District Attorney for this District, was in *New York* confined to his bed by sickness. And had Foster Blodgett, by virtue of this statute, then demanded of the Court the right to present his challenge, I should have felt it to be my duty, as a judge, to have postponed the consideration of the question until the coming of the District Attorney, or until his place was filled *pro tem.*, in pursuance of the sanction of the Honorable Secretary of the Interior.

Nor ought the unavoidable absence of the District Attorney, at the time of the organization of the grand jury, to prejudice the rights of the government, and in my judgment, he may still present challenges under the first section of the statute; or he may move the Court, under the second section, to have the oath, incorporated therein, presented to the grand jurors, and the motion will be granted.

But that Mr. Blodgett comes within the spirit and true intent of the rule as to the right of challenge and the time to present challenges, I do not think there is any doubt whatever; he was informed by the prosecuting officer of the United States for this District, that he expected to prosecute him before the grand jury at this term of the Court for perjury. In *Breeding vs. The State*, 11 Texas, 257, it was held, that any person to be affected by the finding of the grand jury may object to their fitness. 1 BISHOP, *Criminal Procedure*, Sec. 724. From this authority, and others that might, if necessary, be cited, and on principle, it would seem that it is not essential to the right of challenge to grand jurors that the challenger should be in prison, or out on bail, for if he be warned, as Blodgett was in this case, by the District Attorney for this District—the officer to whom the duty of prosecuting for crimes against the laws of the United States is confided—that he intended to prosecute him before a grand jury at a particular term of the Court, the person thus notified is thereby affected.

After a most careful consideration of the proceedings before the Court, I am of the opinion that Foster Blodgett had the right to present his challenges at the organization of the grand jury, and further, that he has not waived that right, and may present them now.

In accordance with this judgment thirteen of the panel were excepted to under the first section of the statute. And for the reasons already given in the early part of the opinion, the Clerk read the oath in the second section to the jurors challenged, upon which the Court said, that if any one of the jurors, included in the challenge, believed that he came within one or more of the causes of disqualification mentioned in the first section, he could retire from the jury box. All those who had been challenged, except two, withdrew.

The District Attorney then said that he desired to present a motion to the Court to review and reverse its decision on this point, to-wit: that the mode adopted to try the challenges was erroneous. Leave was given, and he asked time to prepare his argument and produce authorities, which was also granted.

The following morning, the motion being put in writing, argument was had in support of it by the District Attorney, and *contra* by H. R. Jackson, Esq., counsel for Foster Blodgett.

The Court denied the motion, and the jurors who had retired the day preceeding were discharged for the term. The panel was then filled from the talesmen (subpœnaed on the previous day,) who were immediately sworn in chief.

The Court, on motion of the District Attorney, and in pursuance of the second section of the statute, caused the oath therein to be read by the Clerk to the jurors. But the District Attorney declining to have said oath administered, the grand jurors, under the instructions of the Court, retired to enter upon their duties.

United States vs. The Athens Armory.

THE UNITED STATES vs. THE ATHENS ARMORY, etc., FRANCIS L. COOK, Claimant.

- [1.] Capture, in technical language, is a taking by military power; seizure, a taking by civil authority.
- [2.] Statutes which work forfeitures or confiscations of property, require a close construction; but full effect is, nevertheless, to be allowed to the legislative will.
- [3.] In the trial of Informations founded on seizures of land or upon land, under the Act of August 6th, 1861, issues of fact are decided by a jury according to the course of the common law, not by the Judge as in Admiralty.
- [4.] Remarks and authorities upon the penal or remedial nature of the Confiscation Acts of August, 1861, and July, 1862.
- [5.] A mortgage in Georgia is only security for a debt—the title to the property remains in the mortgagor. This is fully settled as a rule of property by a series of State adjudications; and where such is the case, the Federal Courts adopt the decisions of the State Courts.
- [6.] Pardon defined and its effects considered. A full pardon, granted and accepted prior to the seizure of property, or the institution of any proceeding to condemn it, is a bar to a judgment of condemnation under the Confiscation Acts.

Information. In the District Court for the Northern District. Decision by Judge ERSKINE. March Term, 1868.

At March Term, 1867, of this Court, the District Attorney, in behalf of the United States, filed an Information against certain property, real and personal, particularly described in the pleadings, and consisting of a tract of land near Athens, Georgia, with the buildings and improvements thereon, together with a great variety of articles, chiefly machinery, implements, and material, for the fabrication of arms, some of the material being unwrought, and some of it advanced more or less towards completion as weapons of war. The property, of every kind, is of the value of \$150,000; and it came to the custody of the Marshal under a warrant of seizure issued on the 22d of November, 1866, by the District Attorney.

The Information treats the property as having belonged, prior to the occurrence of the alleged causes of forfeiture, to Ferdinand W. C. Cook and Francis L. Cook, copartners using the name of Cook Brothers, and prays, on three grounds, for its condemnation under an Act of Congress, approved August 6, 1861, and on an additional ground for its condemnation under an Act approved July 17th, 1862.

The provisions of these Acts are, in part, recited; and it is averred that the proclamations of the President therein contemplated were issued and published.

The grounds of forfeiture alleged under the Act of August 6th, 1861, are the following:

1. That after the passage of said Act, and after the publication of the President's proclamation in pursuance thereof, and during the late rebellion, Cook Brothers, for \$150,000, sold and conveyed the property to the so-called Government of the Confederate States, knowingly, with intent that the same should be used and employed in aiding, abetting, and promoting the rebellion.

2. That Cook Brothers, having on the first of April, 1862, entered into a contract with the so-called Confederate States for the manufacture of 30,000 rifles, did, on the 14th of July thereafter, to secure the sum of \$150,000, paid in advance on said contract, make a deed of trust or mortgage to the said so-called Confederate States covering the property now libelled; that the said Cook Brothers used and employed said property in aiding the rebellion, and especially in manufacturing said rifles, and that said deed of trust or mortgage was executed by them, knowingly, with intent to aid the rebellion, or to suffer the property to be used by others in aiding it.

3. That during the rebellion, and after the Act of Congress and the President's proclamation, as aforesaid, the property was mortgaged by Cook Brothers to the so-called Confederate States, knowingly, with intent to employ the same or suffer it to be employed in aiding the rebellion; and that the said so-called Confederate States, in consideration of such mortgage, paid them \$150,000, which they received with intent that it, too, should be used in aiding the rebellion, or by persons engaged in the rebellion.

The ground of forfeiture alleged under the Act of July 17th, 1862, is as follows:

4. That Cook Brothers did not, within sixty days after the publication of the President's proclamation conveying

the warning provided for by said Act, cease to aid, countenance, and abet the rebellion, and return to their allegiance to the United States, but that they contracted to manufacture, and did manufacture upon the land and with the machinery and implements described in this Information, a large number of rifles for the so-called Confederate States, receiving, to that end and for that purpose, certain advances and sums of money, and did sell and deliver said rifles to the so-called Confederate States in accordance with the contracts, mortgages, deeds of trust and conveyances before mentioned, "with the intent and purpose aforesaid."

After the filing of the Information Francis L. Cook, as survivor of Cook Brothers, his co-partner Ferdinand W. C. Cook having departed this life on the 11th of December, 1864, appeared and interposed a claim to said property, asserting thereby his right to the same. He answered both the Information itself and sundry special interrogatories propounded to him by the District Attorney. From these answers, which stand uncontradicted, it appears that Cook Brothers were workers in iron, and from the year 1854 to April, 1862, had their establishment in New Orleans, La. It was there that, on the 1st of April, 1862, they entered into the contract set forth in the Information, with the so-called Confederate States, for the manufacture of 80,000 rifles. From New Orleans they removed to Selma, Alabama, where they remained for a short time, and where the deed of trust referred to in the Information was executed by them, not, however, directly to the so-called Confederate States, but to a disinterested individual as trustee, and not affecting the whole of the property embraced in the Information, but only a part of the machinery and implements. It was made to operate as a mortgage, and as such to secure the said so-called Confederate States for an advance of \$150,000 in so-called Confederate currency.

From Selma they removed to Athens, Ga. They there, in August and December, 1862, and January, 1863, by different deeds and in several parcels, acquired title to the

land proceeded against by this Information, some of which was paid for out of the above mentioned advance; and said advance was further secured by a mortgage upon the whole property, real and personal, executed in Georgia by Cook Brothers to the so-called Confederate States, on the 7th of October, 1862. A similar mortgage, to secure another advance of \$100,000 in like currency, was executed in Georgia on the 5th of January, 1864.

The buildings upon the land, except a mill, were erected by Cook Brothers, in the years 1862 and 1863, and cost \$300,000 in Confederate currency. They were paid for in part out of the advances already mentioned, and in part with funds derived from other sources. They were made and used chiefly, though not exclusively, for the manufacture of arms.

At least two-thirds of the machinery, tools, &c., in the establishment, were on hand in and prior to the year 1861. Additions costing about \$77,000 in Confederate currency, were made thereto in the three following years, and, like the land and buildings, were paid for in part out of the advances of currency made by the so-called Confederate States.

Upon the premises, and with the machinery and implements covered by this Information, the manufacture of arms was carried on by Cook Brothers, both members of the firm knowing of the same and consenting thereto. They delivered, at Athens, to the Government of the so-called Confederate States, between 3,800 and 4,000 rifles, believing that the same were to be employed in the war then going on against the United States; and the Confederate currency received by them in the years 1862, 1863, and 1864, from said pretended Government, amounted to over \$600,000. This was for rifles, horse shoes, repairing old guns, &c., &c., with an admitted balance in favor of said Government, at the time of its overthrow, of \$69,104 in said currency.

Coupled with the foregoing facts, the claimant's answer contains a formal denial of the motives, purposes, and intent charged in the Information, and avers, on the contrary,

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that all these things happened in the course of business transactions—Cook Brothers being engaged simply in their ordinary vocation, and actuated solely by the desire of gain and the hope of legitimate profit.

The claimant, also, in bar of the Information, pleads the pardon of the President, bearing date December 11th, 1865. He exhibits said pardon with proof that he accepted it on the day after its date, and of his having taken the oath of amnesty on the 29th of November preceding.

H. S. FITCH, United States Attorney, for the Government.

W. DOUGHERTY and WILLIAM H. HULL, for claimant.

ERSKINE, J.—This is a proceeding *in rem*, instituted in this Court at the March Term, 1867, by the District Attorney, "who prosecutes for the United States and an informant," to confiscate and condemn certain real and personal property situate in Clark county in this district, and known as the "Athens Armory." The information contains four counts: three are founded on the Act, entitled, "*An Act to confiscate property used for insurrectionary purposes.*" Approved August 6, 1861. 12 Stats. 319; and the fourth, on the Act, entitled, "*An Act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of Rebels, and for other purposes.*" Approved July 17, 1862. *Id.* 589.

Section 1st of the Act of August 6, 1861, is as follows:

"If during the present or any future insurrection against the Government of the United States, after the President of the United States shall have declared, by proclamation, that the laws of the United States are opposed, and the execution thereof obstructed, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the power vested in the marshals by law, any person or persons, his, her, or their agent, attorney, or employee, shall purchase or acquire, sell or give any property of whatso-

ever kind or description, with intent to use or employ the same, or suffer the same to be used or employed, in aiding, abetting or promoting such insurrection or resistance to the laws, or any person or persons engaged therein; or if any person or persons, being the owner or owners of any such property, shall knowingly use or employ, or consent to the use or employment of the same as aforesaid, all such property is hereby declared to be lawful subject of prize and capture wherever found; and it shall be the duty of the President of the United States to cause the same to be seized, confiscated and condemned.

Section 2. Such prizes and capture shall be condemned in the District or Circuit Court having jurisdiction of the amount, or in admiralty in the district in which the same may be seized, or into which they may be taken and proceedings first instituted."

During the discussion of this case, various and very opposite views were presented by counsel, as to the sense in which the words "prize" and "capture," and the phrase "prizes and capture," as used in this Act, are to be understood. But, I apprehend, that on a careful reading of the whole statute, the question will not prove difficult of solution. For, whether these naval and military terms—here evidently intended to include, not only seizures of property water-borne, but seizures of land, and of property found on land—were incautiously introduced into the statute, is not a matter for critical examination. No one can read this law, without learning from its entire perusal, that it was the controlling purpose of Congress, in enacting it, to make it one of the means to suppress the rebellion. Therefore, it is obvious, that it could not have been in the mind of Congress to confine these words or terms to their technical meaning exclusively; for "prize means maritime captures only—ships and cargoes taken by ships." 2 Dods. 446.

Statutes must not be so construed as to produce a result different from what was intended by the law-giver. Limit the term "prize" or "capture," as here employed, to a strict

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technical import, and the statute fails of its object, and becomes an absurdity; for in many instances, cases have arisen fairly embraced within its purview, wherein the intention of the legislature would be defeated, if these terms were restricted to their narrow sense. This Act was passed to confiscate property—"any property of whatsoever kind or description"—used or employed (after warning by proclamation) in aid of the rebellion; whether the contaminated property be found afloat, or on shore, or it be land itself.

A brief synopsis of such portions of the Act of July 17, 1862, as were invoked in argument, may be given: Section five declares, that "To insure the speedy termination of the present rebellion, it shall be the duty of the President of the United States to cause the seizure of all the estate, property," etc. of the persons therein named, and to apply and use the same, and the proceeds thereof for the support of the army.

The next section provides for the seizure of all the estate, etc., as in the preceeding one, "of persons other than those named as aforesaid," who being engaged in armed rebellion, or who aid and abet the same, and who shall not, within sixty days after public warning and proclamation, cease to aid, countenance and abet such rebellion, and return to their allegiance.

The seventh declares that "to secure the condemnation and sale of any such property, after the same shall have been seized," proceedings *in rem*, in the name of the United States shall be instituted in any District Court thereof, in which the property or any part of it may be found, or into which the same, if movable, may first be brought, and the proceedings "shall conform, as nearly as may be, to proceedings in admiralty or revenue cases;" and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid and comfort thereto, "the same shall be condemned as enemies property, and become the property of the United States," etc.

This Act also makes all sales, transfers, and conveyances

of any such property null and void; "and it shall be a sufficient bar to any suit brought by such person for the possession or the use of such property, or any of it, to allege and prove that he is one of the persons described," in the fifth or sixth section.

The capture, or—more appropriately—the seizure before the Court, consists of realty, and of personalty found on land. A capture, in technical language, is a taking by military power; a seizure, a taking by civil authority: and it is upon the latter mode of gaining possession that the District Attorney has counted in the information.

These statutes, being laws to work forfeitures, or confiscations of property, are within that class which require a close construction. But notwithstanding the rule, that in statutes of this kind, the intention is to be attained by strict interpretation, it is nevertheless the duty of the Judge to give full expression to the legislative will,—“to ascertain which will,” says BISHOP (1 Crim. Law, sec. 231) “is the great end of all interpretation.” *United States vs. Eighty-four Boxes Sugar*, 7 Peters, 453. *The Schooner Enterprise*, 1 Paine, 32. *United States vs. Wigglesworth*, 2 Story, 369. *Taylor vs. United States*, 3 How. 197. *Attorney General vs. Radloff*, 10 Exch. 84. *Per GOULD, J. in Myers vs. The State*, 1 Conn. 502.

Both Acts are simply municipal laws; consequently, the Government cannot demand, nor the claimant oppose, the confiscation of any of the property covered by the information, by force of the law of nations; each must rely for success on the statutes alone. The source from whence they spring, and their effect, as real or personal statutes, differ essentially from those laws which regulate the intercourse of independent, or foreign nations.

The District Attorney, in replying to the inquiry made by counsel for the claimant as to the proper mode of procedure and trial to be adopted in the adjudication of this case, said: “The proceedings for condemnation, under the Act of August 6, 1861, of such ‘prize and capture’ should conform as near

as possible to proceedings in admiralty causes; and such," continued the learned counsel, "has been the construction placed upon the Act by the United States Court of Alabama in similar cases."

I have not been favored with the perusal of any ruling of the Federal Courts for Alabama, on this question. This I regret. But after a careful resolving of the statute itself, I am constrained to entertain the opinion, that neither in its words nor in its essence does it warrant the conclusion, that in seizures of land, or of property seized on land, the proceedings for condemnation should conform to proceedings in admiralty, further than what may be necessary, in a suit *in rem*, to initiate the cause and shape it for trial.

The principles governing the District Courts of the United States in the determination of seizures of this kind, are in accordance with the common law, and the trial has, hitherto, been in pursuance of the manner of the English exchequer on informations *in rem*, where the decision of issues of fact devolve on a jury. This Court cannot undertake to say that the national legislature, in passing this statute, contemplated the expansion of the jurisdiction of the admiralty, so far beyond what was understood and intended by it at the time of the formation of the Constitution as to withdraw from the suitor, in a seizure like this, the right of a trial by jury, and to transfer the determination of the cause to the breast of a single judge.

United States vs. Schooner Bevy & Charlotte, 4 Cranch. 443. *Six hundred and fifty-one Casks of Tea vs. United States*, 1 Paine, 490. *United States vs. Fourteen Packages*, Gilpin, 255. *The Sarah*, 8 Wheat. 301.

Section 9, chap. 20 of the judiciary Act conferred, *inter alia*, on the District Courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, and of all seizures on land and on water, and of all suits for penalties and forfeitures incurred under the laws of the United States, "saving to suitors, in all cases, the right to a common law remedy, where the common law is competent to

give it." And Mr. Justice FIELD, in delivering the opinion of the Supreme Court of the United States, in the case of *The Moses Taylor*, 4 Wall. 411, gave the following comprehensive exposition of this reservation: "It is not a remedy in the common-law courts which is saved, but a common-law remedy. A proceeding *in rem*, as used in the admiralty courts, is not a remedy afforded by the common law; it is a proceeding under the civil law. When used in the common-law courts it is given by statute."

The judiciary Act confined the original cognizance of suits for penalties and forfeitures to the District Courts exclusively. But the Act of August declares, that property used or employed for insurrectionary purposes shall "be lawful subject of prize and capture wherever found," and that, "such prizes and capture shall be condemned in the District or Circuit Court having jurisdiction of the amount." Thus bestowing upon the latter Court concurrent original cognizance, with the District Court, when the amount is sufficient. And if the District Court for this District proceed by virtue of the Circuit Court powers, bestowed on it by the Act of August 11, 1848, the course of proceeding and trial must, on principle, be the same as in the District Court proper.

Counsel on both sides admitted that the proceedings and trial, under the Act of July, to condemn this property should be in accordance with the common law.

I would here remark that if the views which I have expressed on the Act of August are erroneous,—if, under this statute, the procedure and trial in seizures like this, instead of being in pursuance of the rules of the common law, should be in conformity to those of the admiralty or civil law,—then a peculiar anomalous jurisdictional diversity arises, and opposite modes of trial follow; the first three counts in the information would be decided by the Judge alone, and the fourth by a jury.

During the discussion of some of the foregoing questions, the Court intimated that the trial for the condemnation of this property must be according to the course of the com-

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mon law. The counsel then agreed to dispense with the intervention of a jury, under section 4 of the Act of March 3, 1865, 13 Stats. 501, for the purpose of casting the trial of the issues of fact upon the Court; and to effect this, they filed a stipulation with the Clerk, as required by that section of the Act.

But to impose the trial and determination of issues of fact on the Court, two things are necessary; *first*, it must be a civil case; and *secondly*, it must be pending in a Circuit Court. Under the Act of August, as remarked above, the proceedings, without regard to amount, may be instituted in the District Court, and, concurrently with it, in the Circuit Court, when the amount is sufficient to give the latter jurisdiction; while all proceedings under the Act of July must be brought in the District Court.

This is, as already observed, a proceeding *in rem*;—an information filed by the District Attorney, *ex-officio*, who prosecutes for the United States and an Informer, to enforce the condemnation of realty, and of personalty seized on land. The Act of August provides that the Attorney-General, or district attorney, “may institute proceedings of condemnation”; but the name or the nature of the remedy to be adopted in effectuating the condemnation, is not given; and, therefore, as to what is a proper remedy can be inferred only from the spirit of the statute and its evident object.

The Act of July, however, [*to which Informers are unknown*] is more definite. It declares that, “to secure the condemnation and sale of any such property, after the same shall have been seized, so that it may be made available for the purposes aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any District Court thereof,” etc.; “which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases.”

For the government, it was argued that these statutes are remedial laws, and clearly distinguishable from penal or

criminal statutes. Whereas, on the part of the claimant, it was insisted that they are criminal laws, and that the confiscation inflicted by them is a punishment for crime; and further, that an information *in rem* is not a suitable remedy by which to invoke a judgment of confiscation.

Whether these statutes are remedial laws, as contra-distinguished from penal or criminal enactments, is an intricate and perplexing question—inwrapped in doubt, and difficult to determine so as to satisfy the judicial mind. They are of a nature peculiar to themselves, and cannot, I think, be assigned to any particular department of jurisprudence.

By the District Attorney these Acts were likened also to revenue laws. The argument was plausible, but it failed to convince. Mr. Justice GRIER, in pronouncing the decision of the Court in *Francis v. United States*, 5 Wall., 338, remarked that the Act of August 6, 1861, “is not an Act for the collection of revenue.” What was there said will apply with still greater force to the Act of July 17, 1862. The general object of revenue laws is merely the collection of duties and taxes, though, they may impose fines and work forfeitures of property.

Counsel for the claimant contended that confiscations under these statutes are in no manner different from forfeitures of enemy property in times of war; and that the law of nations is the touchstone for construing them. To this argument *The Prize Cases*, 2 Black 635, would seem to furnish an answer.

In ulterior consequences, these statutes, in my judgment, resemble those laws enacted by some of the States during the war of Independence, by which the estates of persons absenting themselves from the country, lapsed, or escheated, or were otherwise forfeited to the people. *Gilbert et. al. v. Bell*, 15 Mass, 44. *Borland v. Dean*, 4 Mason 174.

After a careful perusal of the Acts of August and July, I am inclined to be of the opinion, that there are some portions of each which may be found to possess a nearer affinity to criminal law, than to remedial jurisprudence. But

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the question will receive no discussion, as a decision upon it is not essential. If, however, it were necessary to decide it, some aid might be gathered from the case of *Fisher v. McGirr et. al.*, 1 Gray 1.

Under the Act of August, the offence stamps itself primarily on the property,—it is the offender; and its forfeiture is the penal consequence of the act of the owner in knowingly using it, or consenting to its employment for illegal purposes. His transgression—in acquiring, or disposing of property with intent to use or employ it, or to suffer it to be used or employed, in aiding, abetting or promoting rebellion; or, being the owner of property, knowingly using or employing, or consenting to the use and employment of it as aforesaid—is the point upon which the confiscation turns. But under the Act of July the offence impresses itself primarily on the owner,—he is the offender; and the forfeiture of his property is a penalty inflicted for his crime. And, under this last Act, it is not necessary, to work the forfeiture, that the property be adherent to the rebellion.

Concurrent with, and explanatory of this statute, Congress passed a *Joint Resolution*, which, *inter alia*, provides, as follows: “nor shall any punishment or proceeding, under said Act, be construed so as to work a forfeiture of the real estate of the offender beyond his natural life.” 12 Stats. 627.

It was insisted on behalf of the claimant, *first*, that these statutes are unconstitutional and void; and, *secondly*, if not so, that they expired with the rebellion. But as the claimant, among other matters relied on by him, has, to his claim and answer, superadded a plea of pardon, the Court is relieved from considering either of those propositions.

As to the question whether the proceeding instituted by the government to confiscate this property is a civil suit, or a criminal proceeding, Mr. Justice Story, in an *Anonymous* case, 1 Gall 22, said: “But it is not true that informations

in rem are criminal proceedings. On the contrary, it has been solemnly adjudged that they are civil proceedings." Citing several cases.—And see *The Palmyra*, 12 Wheat. 1.

The case of the *United States v. La Vengeance*, 3 Dall. 297, was an information filed by the District Attorney, founded on a statute prohibiting the exportation of arms and ammunition. It was argued that the proceeding was of common law jurisdiction and a criminal cause. But the Court held it to be of admiralty jurisdiction. And Chief Justice MARSHALL, in the course of the opinion, said: "In the next place, we are unanimously of opinion, that it is a civil cause: it is a process in the nature of a libel *in rem*; and does not, in any degree, touch the person of the offender."

These cases were in admiralty.

Notwithstanding an action *in rem* may be deemed a civil proceeding, yet it undoubtedly is a proper remedy to enforce a forfeiture incurred under the provisions of a penal statute. *United States v. Eighty-four Boxes of Sugar*, *supra*. See 2 PARSONS ON *Maritime Law*, 682. *Attorney-General v. Radloff*, *supra*.

This last case arose on an information filed to recover penalties for smuggling. Counsel for defendant proposed to call the defendant himself as a witness on behalf of the defence, under an Act allowing parties, in civil cases, to testify on their own behalf. The crown objected, and the objection was allowed. A *rule nisi* followed, and it was heard before the Court of Exchequer.

The point in judgment was under an Act of Parliament declaring that in "all penalties or *forfeitures* incurred or imposed by this or any other Act relating to the customs, or to trade or navigation, shall and may be sued for, etc., by action of debt, plaint, bill, or information," etc. MARTIN and PLATT, B. B., held, that the information filed under this section was not a criminal proceeding, and, therefore, the defendant was improperly rejected. But PARKE, B., and POLLOCK, C. B., decided that it was a criminal proceeding.

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Said the former: "An information by the Attorney-General for an offence against the revenue laws, is a criminal proceeding—it is a proceeding instituted by the crown for the punishment of a crime—for it is a crime and an injury to the public to disobey statute revenue law, and, accordingly, the old form of proclamation, made before trial of informations for such offences, styles these offences 'misdemeanors.'" The opinion of POLLOCK, C. B., (who tried the case below,) was to the same effect.

The Court being equally divided, the rule ~~was~~ dropped, and, consequently, the decision at *Nisi Prius* remained undisturbed.

In the first count of the information it is alleged, that after the passage of the Act of August 6, 1861, and after the promulgation of the President's Proclamation in pursuance thereof, and during the rebellion, Cook Brothers, for one hundred and fifty thousand dollars, granted, bargained, sold, and conveyed the property embraced in the information, to the so-called Confederate Government, knowingly, with intent that the same should be used and employed for insurrectionary purposes. In the other counts, based on this statute, it is alleged, that Cook Brothers mortgaged this property to the so-called Confederate Government, after the passage of the Act and the publication of the Proclamation, knowingly, and with the intent that it should be used and employed in aiding and promoting the rebellion. I have carefully examined all the conveyances relied on by the District Attorney, and find them to be, in every instance, deeds of mortgage.

Now, if the rule of the common law prevailed in this State, the legal title would undoubtedly have passed to the so-called Confederacy; but here a mortgage is a mere security for the debt, and nothing more.

In *Davis et. al. v. Anderson et. al.*, 1 Kelly, 176, WARNER, J., delivering the opinion of the Court, said, that "a mortgage in Georgia is nothing more than a *security* for a debt, and the title in the mortgaged property remains in the mort-

gagor, until foreclosure and sale in the manner pointed out by the statute." Other cases followed to the same effect. 1 Kelly 572; 4 Ga. 169; 7 *Id.* 183, 499; 10 *Id.* 66, 300; 26 *Id.* 197; 27 *Id.* 389. In *Jackson v. Carswell*, 1 Blackley, 279, (34th Ga.) the same Court, in express terms, *per* WALKER, J., affirmed *Davis et. al. v. Anderson et. al.* So this question, in the doctrine of mortgages, may be considered as settled in Georgia.

Mr. Justice DAVIS, in pronouncing the opinion of the Supreme Court of the United States in the case of *Chicago City v. Robbins*, 2 Black 418, said: "Where rules of property in a State are fully settled by a series of adjudications, this Court adopts the decisions of the State Courts." See *Id.*, 428. Also *Swift v. Tyson*, 16 Peters 1.

It is in evidence that Ferdinand W. C. Cook, of the late firm of Cook Brothers, died in 1864. The surviving partner, Francis L. Cook, interposes, and claims the legal title to the property before the Court. In his claim and answer to the information, and likewise in his responses to certain special interrogatories propounded by the government, he confesses that upon the premises and with the machinery, and implements, the manufacture of arms for the so-called Confederate Government was carried on by Cook Brothers, both members of the firm known of the same, and consenting thereto, and believing that the arms were to be used and employed in the war then going on against the Government of the United States.

He adds to the foregoing confession, a formal denial of the motives, purposes, and intent charged in the information, and avers, that all these things happened in the course of business transactions, Cook Brothers being workers in iron, and engaged simply in their ordinary vocation, and actuated solely by the desire of gain, and the hope of legitimate profit.

But that Francis L. Cook cannot thus purge himself of the offences just confessed,—voluntarily fabricating arms for the so-called Confederate Government, and believ-

ing, at the very time, that they would be employed in levying war against his country; and knowingly using, and consenting to the employment of the property covered by the information, for insurrectionary purposes,—is a principle of the criminal law too well established to bear discussion, or to elicit comment. *Respublica v. McCarty*, 2 Dall. 86. *United States v. Vigol, Id.*, 346. *Ex parte, Bollman* 4 Cranch, 75, 126.

In addition to the many matters discussed during the hearing of this cause, the District Attorney incidentally alluded to a balance admitted by the claimant to be due by him to the rebel government, at the date of its downfall, amounting to \$69.104 dollars, in "Confederate Treasury notes." But this question cannot be adjudicated in a suit *in rem*.

The claimant interposed a plea in the nature of a plea of pardon, alleging that a pardon was granted to him by the President of the United States, on the 11th day of December, 1865, and prior to the issuing of the warrant of arrest.

In his plea, he alleges, that the President granted to him, (using the words of the grant,) "a full pardon and amnesty for all offences by him committed, arising from participation, direct or implied, in the rebellion,"—adding an averment, that he has performed all and singular the conditions therein contained, and prays judgment and a writ of restitution.

The pardon was produced, and inspected by the Court. It contains the following conditions, to-wit: *First*, that he shall take the oath prescribed by the President in his Proclamation of May 29, 1865. *Secondly*, that he shall never acquire any property whatever in slaves, nor make use of slave labor. *Thirdly*, that he shall "first pay all costs accrued in any proceedings instituted, or pending against his person or property before the date of the acceptance of this warrant." *Fourthly*, that he "shall not by virtue of this warrant, claim any property, or the proceeds of any property that has been sold by the order, judgment, or decree of a Court under the confiscation laws of the United States;" and, *fifthly*, that he shall notify the Secretary of State, in

writing, that he has accepted said pardon. A copy of the acceptance was annexed to the plea, and bears date December 12, 1865.

In proceeding to inquire into the legal effect of this charter of pardon, it may be borne in mind that the documentary proofs show that it was granted on the 11th of December, 1865, accepted on the ensuing day, and the proper officer notified. That the warrant of arrest was issued on the 22d of November, 1866, and very shortly thereafter the property was seized by the Marshal; and at the March Term, 1867, of this Court, the District Attorney filed the information.

It is manifest from the language of the pardon itself, without resorting to construction, that the Executive, by his warrant or grant to Francis L. Cook, not only forgave and buried in oblivion, all offences by him committed, arising from participation, direct or implied, in the rebellion; but also clearly intended to restore to him all his confiscable property. Observe the words, found in the premises, "full pardon and amnesty"—words the most comprehensive and potent that could be employed to carry this intention. And if the grantee has performed all conditions precedent, and has not violated any of the conditions subsequent, then, all the right, title, and immunities bestowed by the grant, vested, and continues vested in him; and—if the charter of pardon be construed agreeably to the laws of this State—in his heirs.

If this last conclusion is sound, it may be assumed—provided the conditions subsequent, in the pardon, were affirmative conditions, and not personal and inseparable from the grantee—that had he died before complying with these conditions, his heirs could come in and comply; premising, of course, that the forfeitures or confiscations imposed under the provisions of these statutes, extend beyond the life of the grantee. This question might arise under the Act of August, but not under the Act of July, unless personal estate is included in the term "forfeiture" as understood in

the third section of the third article of the Federal Constitution. And this proposition is equally as applicable to personal representatives as to heirs. *Sir Edward Phitton's case*, 6 Rep. 79 b. is in point : Sir Edward was outlawed at the suit of one R. after judgment, and before the general pardon of, 43 Eliz.; and after the pardon Sir Edward died. The Court held, that his executors could avail themselves of the pardon, and have the benefit of it; and this, too, whether executors or administrators were named in it or not. Citing *Lord Mordaunt's case*, Cro. Eliz., 294.

A pardon is an act of mercy flowing from the fountain of bounty and grace; its effect, when it is a full pardon, is to obliterate every stain which the law attached to the offender, to place him where he stood before he committed the pardoned offense, and to free him from the penalties and forfeitures to which the law had subjected his person and property:—"to acquit him," says Sir William BLACKSTONE, "of all corporal penalties and forfeitures annexed to the offence for which he obtains his pardon." 4 Com. 402.

"A pardon," says Lord COKE, "is a work of mercy, whereby the King, either before attainder, sentence or conviction, or after, forgiveth any crime, offence, punishment, execution, right, title, debt or duty, temporal or ecclesiastical: All that is forfeited to the King by any attainder, etc., he may restore by his charter." 3. Inst. 233d.

The *King v. Greenvelt*, 12 Mod. 119. Motion to discharge Dr. Greenvelt, *pro malâ praxi*. It was argued, that the King having granted the fines to the College, he could not by his pardon destroy his own grant; and that the fines remained notwithstanding.

"But *per CURIAM, seriatim*: The penalty *pro malâ praxi*, is only a satisfaction to the public justice, and not to the party, who had his action on the case; and that whenever a crime is pardoned, all the effects and consequences thereof are discharged; that when an Act of Parliament appoints a fine for a public offence, such fines, of common right, belong to the King, unless they are otherwise particularly disposed;

that the King by granting away his fines, does not extinguish his power of pardoning, for that would be an extinguishment of his prerogative by implication; and the power of pardoning being inseparably annexed to the Crown, and not grantable over, the King therefore pardoning this offence, before the fine actually imposed, whereby an interest would have vested in the grantee, the offence was thereby gone, and the penalty pending thereon discharged."

In *ex parte Wells*, 18 How. 307, it was said by a distinguished jurist—Mr. Justice WAYNE—in pronouncing the opinion of the Court, that "when the words, to grant pardon, were used in the Constitution, they conveyed to the mind the authority as exercised by the English Crown, or by its representatives in the colonies. * * * We must, then, give the word the same meaning as prevailed here and in England, at the time it found a place in the Constitution."

Mr. Justice FIELD, in delivering the opinion of the Court, in *ex parte Garland*, 4 Wall. 333, said: "A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence."

Although laws are not framed on principles of compassion for guilt; yet when Mercy, in her divine tenderness, bestows on the transgressor the boon of forgiveness, Justice will pause, and, forgetting the offence, bid the pardoned man go in peace.

JUDGMENT.

On hearing the above cause, and having inspected the charter of free and full pardon granted by the President of the United States, on December 11, 1865, (before any judicial proceedings had been instituted in any Court for the condemnation of the property covered by the Information) to Francis L. Cook, the claimant, and by him pleaded in-

Scudder vs. Thomas.

bar of these proceedings, it is considered and adjudged by the Court here, that the said plea of the claimant be allowed, and that this cause be dismissed, and it is so ordered. The Court adjudges nothing further in the case.

3d of April, 1868.

JOHN SCUDDER VS. JOSEPH A. THOMAS.

A note given for the loan of Confederate money, was illegal, without consideration and void; so, also, was a note or due bill given in renewal of such original note.

In the Circuit Court at Savannah. April Term, 1868.

Assumpsit for the recovery of four thousand five hundred dollars, on a due bill, of which the following is a copy :

"BURKE COUNTY, March 3, 1866.—Due John Scudder the sum of four thousand five hundred dollars, for value received, with interest from January 11th, 1866.

(Signed)

"JOSEPH A. THOMAS."

To the declaration defendant pleaded the general issue, and a special plea that the said due bill, or promissory note, was without consideration, inasmuch as it was given in settlement and renewal of a note, the consideration of which was the loan of Treasury notes issued by the so-called Confederate States, which were issued contrary to law and were of no value.

To this plea, plaintiff replied that on the 16th of April, 1862, defendant borrowed of him seven thousand five hundred dollars in Confederate Treasury notes, to secure the payment of which he gave his promissory note for said sum, with interest, and that at that time these Treasury notes were of great value. That on the 3d day of March, 1866,

plaintiff held the said note for seventy-five hundred dollars, and also a promissory note made by one Robert Thomas, for five hundred dollars, and that in compromise and in consideration of the surrender of these two notes, defendant gave his due bill or promissory note for forty-five hundred dollars, now sued on.

To this replication defendant demurred.

ERSKINE, J.—The promissory note given by the defendant to the plaintiff, April 16, 1862, for the loan of Treasury notes issued by the so-called Confederate States, was without consideration and void,—the contract being illegal in its inception. And the due bill made March 3, 1866, and delivered to the plaintiff in compromise and settlement of the original note, and the further supposed consideration of the surrender to the defendant of the note of Robert Thomas, inherits the taint of the note of April, 1862, and is likewise invalid. For when a contract, in whole or in part only, grows immediately out of, and is connected with an illegal transaction, notwithstanding it may be a new contract, it is equally contaminated.

This case falls directly within the principle of *Toler v. Armstrong*, 4 Wash. 296, and the case of *M. U. Milner*, lately decided in the United States District Court, Northern District of Georgia.—*ante* p. 330.

The demurrer must be sustained. Judgment, *nil capiat*.

MR. GUERARD, for plaintiff.

MR. LLOYD, for defendant.

April 16, 1868.



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